

1-13-2011

James v. Mercea Clerk's Record v. 2 Dckt. 38135

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LAW CLERK

Vol.

2 of 3

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

DIANE JAMES

Plaintiffs/Appellants

SEE AUGMENTATION RECORD

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, FIRST
AMERICAN TITLE COMPANT, INC.,

Defendants / Respondents

JOE A. LAMPHIEAR and SUSAN M. LAMPHIEAR,
Husband and wife, and FIRST AMERICAN TITLE
INSURANCE COMPANY,

Defendants

*Appealed from the District Court of the First Judicial District
of the State of Idaho, in and for the County of Kootenai.*

Edward J. Anson
608 Northwest Blvd., Ste 300
Coeur d'Alene, ID 83814

Attorney for Respondents

John P. Whelan, P.C.
1213 N 4th Street
Coeur d'Alene, ID 83814

Attorney for Appellants

FILED - COPY

JAN 13 2011

38135

VOLUME 2

Diana James vs. Cornelius Mercea, Patricia Mercea, Joe A Lamphiear, Susan M Lamphiear, First American Title Insurance Company

Date	Code	User	Judge
2/6/2009	NCOC	SREED	New Case Filed - Other Claims
		SREED	Filing: A - Civil Complaint for more than \$1,000.00 Paid by: John Whelan Receipt number: 0833191 Dated: 2/6/2009 Amount: \$88.00 (Check) For:
	SUMI	MCCORD	Summons Issued
	MOTN	CRUMPACKER	Motion to Strike Portions of Defendants Mercea's Answer
2/9/2009	AFFD	LEU	Affidavit Of John P. Whelan In Support Of Motion For Service Of Process Out Of State
	MOTN	LEU	Motion For Service Of Process Out Of State
2/24/2009	ORDR	BOOTH	Order granting motion for service of process out of the state
4/14/2009		SREED	Filing: I7 - All Other Cases Paid by: Ed Anson Receipt number: 0843585 Dated: 4/14/2009 Amount: \$58.00 (Check) For: Mercea, Cornelius (defendant)
	NOAP	SREED	Notice Of Appearance OBO Defendants Cornelius Mercea and Patricia Mercea
4/24/2009		LEU	Filing: J6 - Special motions, petitions and pleadings - Cross claim (defendant v. defendant or plaintiff v. plaintiff) Paid by: Witherspoon Receipt number: 0845151 Dated: 4/24/2009 Amount: \$14.00 (Check) For: Mercea, Cornelius (defendant)
	ANSW	LEU	Answer And Crossclaims Of Defendants Mercea
5/12/2009	MOTN	BAXLEY	Motion For Order Permitting Service Of Summons And Complaint By Publication
	AFIS	BAXLEY	Affidavit Of John P Whelan In Support of Motion For Order Permitting Service Of Summons And Complaint By Publication
	AFSV	BAXLEY	Affidavit Of NON-Service on 4 separate occasions could not serve Joe A Lamphiear and Susan M Lamphiear
6/5/2009		SREED	Filing: I7 - All Other Cases Paid by: Susan Lamphiear Receipt number: 0851170 Dated: 6/5/2009 Amount: \$58.00 (Cash) For: Lamphiear, Susan M (defendant)
	ANSW	SREED	Answer - Joe & Susan Lamphiear
6/9/2009	AFFM	CRUMPACKER	Affidavit Of Service by U.S. Mail
6/17/2009		HUFFMAN	Filing: I7 - All Other Cases Paid by: JOHN K OLSON Receipt number: 0852899 Dated: 6/17/2009 Amount: \$58.00 (Check) For: First American Title Company Inc (defendant)
	NOAP	HUFFMAN	Notice Of Appearance-John K Olson on behalf of First American Title Co

Diana James vs. Cornelius Mercea, Patricia Mercea, Joe A Lamphiear, Susan M Lamphiear, First American Title Insurance Company

Date	Code	User	Judge
6/18/2009	NTSV	COCHRAN	Notice Of Service of Defendant's First Set of Interrogatories, Request for Admission and Requests for Production of Documents to Plaintiff
	ANSW	CANNON	1st American Title Ins. Co's Answer to Complaint & Demand for Jury Trial
7/22/2009	NTSV	COCHRAN	Notice Of Service
7/27/2009	HRSC	BOOTH	Hearing Scheduled (Status Conference 10/05/2009 03:00 PM)
		BOOTH	Notice of Hearing
10/5/2009	DCHH	BOOTH	Hearing result for Status Conference held on 10/05/2009 03:00 PM: District Court Hearing Held Court Reporter: Anne MacManus Number of Transcript Pages for this hearing estimated: under 100 pages
10/8/2009	HRSC	BOOTH	Hearing Scheduled (Jury Trial Scheduled 05/03/2010 09:00 AM) 5 DAY JURY TRIAL
		BOOTH	Notice of Trial
10/14/2009	MOTN	HUFFMAN	Motion to Disqualify Alternate Judge
10/19/2009	NOTC	HUFFMAN	Notice of Facsimile Number Change - John K Olson on behalf of First American Title
	ORDR	CLAUSEN	Order to Disqualify Judge Mitchell as Alternate Judge
10/22/2009	HRSC	BOOTH	Hearing Scheduled (Motion for Summary Judgment 01/07/2010 03:00 PM)
12/2/2009	NTSV	CRUMPACKER	Notice Of Service
	FILE	SREED	New File Created *****FILE #2*****
12/4/2009	HRSC	BOOTH	Hearing Scheduled (Motion for Summary Judgment 02/18/2010 03:00 PM)
	HRSC	BOOTH	Hearing Scheduled (Motion for Summary Judgment 03/03/2010 03:00 PM)
12/9/2009	HRVC	BOOTH	Hearing result for Motion for Summary Judgment held on 01/07/2010 03:00 PM: Hearing Vacated - set and vacated by Ed Anson
	HRSC	BOOTH	Hearing Scheduled (Motion for Summary Judgment 02/04/2010 03:00 PM) set by Ed Anson
12/11/2009	AFFD	SREED	Joint Affidavit of Cornelius Mercea and Patricia Mercea in Support of Motion for Summary Judgment
	AFFD	SREED	Affidavit of Edward J. Anson in Support of Motion for Summary Judgment
	MEMS	SREED	Memorandum In Support Of Defendants Merceas Motion for Summary Judgment
	MISC	SREED	Defendant Merceas Statement of Uncontested Material Facts

Diana James vs. Cornelius Mercea, Patricia Mercea, Joe A Lamphiear, Susan M Lamphiear, First American Title Insurance Company

Date	Code	User	Judge
12/11/2009	MNSJ	SREED	Defendants Merceas Motion For Summary Judgment and Notice of Hearing John P. Luster
12/28/2009	NTSD	CRUMPACKER	Notice Of Service Of Discovery John P. Luster
1/13/2010	HRVC	BOOTH	Hearing result for Motion for Summary Judgment held on 02/18/2010 03:00 PM: Hearing Vacated by John Olson John P. Luster
1/21/2010	AFFD	SREED	Affidavit of John P. Whelan in Support of Motion for Leave to Amend John P. Luster
	AFFD	SREED	Affidavit of Diana James in Opposition to Defendants Merceas' Motion for Summary Judgment; Motion for Leave to Amend Complaint John P. Luster
	MOTN	SREED	Motion for Leave to Amend John P. Luster
	MISC	SREED	Opposition of Plaintiff to Motion for Summary Judgment of Defendants Mercea John P. Luster
	NOHG	SREED	Notice Of Hearing John P. Luster
	MOTN	COCHRAN	Motion for Enlargment John P. Luster
	AFFD	COCHRAN	Affidavit of John P Whelan in Support of Motion for Enlargment John P. Luster
1/28/2010	MISC	CRUMPACKER	First American Title Insurance company's Response to Plaintiffs Motion for Leave to Amend John P. Luster
	AFFD	CRUMPACKER	Affidavit of John K Olson in Support of First American Title Insurance Company's Response to Plaintiffs Motion for Enlargement John P. Luster
	MISC	CRUMPACKER	First American Title Insurance Company's Response to Plaintiffs Motion for Enlargement John P. Luster
	ANSW	LEU	Reply In Support Of Defendants Mercea's Motion For Summary Judgment John P. Luster
	AFFD	HUFFMAN	Affidavit Of John K Olson In Support Of First American Title Insurance Company's Response To Plaintiff's Motion For Enlargement John P. Luster
	MOTN	HUFFMAN	First American Title Insurance Company's Motion To Vacate Trial & Motion For Order Shortening Time To Hear Motion To Vacate Trial John P. Luster
	MISC	HUFFMAN	First American Title Insurance Company's Response To Plaintiff's Motion For Enlargement John P. Luster
	NOHG	HUFFMAN	Notice Of Hearing Re: First American Title Insurance Company's Motion To Vacate Trial & Motion For Order Shortening Time to Hear Motion To Vacate Trial John P. Luster
2/1/2010	MNSJ	BAXLEY	Defendants Lamphiears Motion For Summary Judgment and Notice Of Hearing On 03/03/10 at 3:00 PM RE Same John P. Luster
	AFIS	BAXLEY	Joint Affidavit Of Joe Lamphiear and Susan Lamphiear In Support of Motion For Summary Judgment John P. Luster

Diana James vs. Cornelius Mercea, Patricia Mercea, Joe A Lamphiear, Susan M Lamphiear, First American Title Insurance Company

Date	Code	User		Judge
2/1/2010	MEMS	BAXLEY	Memorandum In Support Of Defendants Lamphiears Motion For Summary Judgment	John P. Luster
	MISC	BAXLEY	Defendants Lamphiears Statement Of Uncontested Material Facts	John P. Luster
	FILE	HARWOOD	*****FILE #3 CREATED*****	John P. Luster
2/2/2010	DFWL	CRUMPACKER	First American Title Insurance Company's Expert Witness Disclosure	John P. Luster
	DFWL	CRUMPACKER	Defendant Mercea's Expert Witness Disclosure	John P. Luster
2/4/2010	MNSJ	BAXLEY	First American Title Insurance Company's Motion For Summary Judgment And Notice of Hearing on 03/03/10 at 3:00 PM	John P. Luster
	MISC	BAXLEY	First American Title Insurance Company's Statement Of Undisputed Material Facts In Support Of Motion For Summary Judgment	John P. Luster
	MEMS	BAXLEY	First American Title Insurance Company's Memorandum In Support Of Motion For Summary Judgment	John P. Luster
	AFIS	BAXLEY	Affidavit Of Phil E DeAngeli In Support of Motion For Summary Judgment	John P. Luster
	HRVC	BUTLER	Hearing result for Jury Trial Scheduled held on 05/03/2010 09:00 AM: Hearing Vacated 5 DAY JURY TRIAL	John P. Luster
	HRSC	BUTLER	Hearing Scheduled (Jury Trial Scheduled 09/13/2010 09:00 AM) 5 DAY JURY TRIAL	John P. Luster
		BUTLER	Notice of Hearing	John P. Luster
	ORDR	BUTLER	Uniform Pretrial Order	John P. Luster
2/5/2010	DCHH	BUTLER	Hearing result for Motion for Summary Judgment held on 02/04/2010 03:00 PM: District Court Hearing Held Court Reporter: ANNE MCMANUS Number of Transcript Pages for this hearing estimated: LESS THAN 300 PAGES set by Ed Anson + motn to amend complaint - MSJ GRANTED IN PART / DENIED IN PART; MOTION TO AMEND COMPLAINT GRANTED	John P. Luster
	LETR	HUFFMAN	Letter - Sue Lamphiear	John P. Luster
2/11/2010	NTSV	BAXLEY	Notice Of Service	John P. Luster
2/23/2010	ORDR	BOOTH	Order granting motion for enlargement	John P. Luster
	ORDR	BOOTH	Order granting motion for leave to file amended complaint	John P. Luster
2/25/2010	ANSW	LEU	Reply In Support Of Defendants Lemphiears Motion For Summary Judgment	John P. Luster
3/2/2010	NOTC	BOOTH	Notice to vacate hearing	John P. Luster
	STIP	BOOTH	Stipulation for entry of Judgment on the Merits	John P. Luster

Diana James vs. Cornelius Mercea, Patricia Mercea, Joe A Lamphiear, Susan M Lamphiear, First American Title Insurance Company

Date	Code	User	Judge
3/2/2010	JDMT	BOOTH	Judgment On The Merits (Pl and First American Title Insurance Co only)
	CVDI	BOOTH	Civil Disposition entered for: First American Title Insurance Company, Defendant; James, Diana, Plaintiff. Filing date: 3/2/2010
	MOTN	BOOTH	Plaintiffs motion to dismiss defendants Lamphiear
3/3/2010	DCHH	BOOTH	Hearing result for Motion for Summary Judgment held on 03/03/2010 03:00 PM: District Court Hearing Held - under 100 pages Court Reporter: Anne MacManus Number of Transcript Pages for this hearing estimated: + SJ SET BY LAMPHIEAR - under 100 pages
3/8/2010	MISC	BOOTH	Objection of Plaintiff to order dismissing defendants Joe A. Lamphiear and Susan M. Lamphiear from this action
	OBJT	SREED	Objection to Plaintiff to Order Dismissing Defendants Joe A. Lamphier and Susan M. Lamphier from this Action
3/10/2010	OBJT	COCHRAN	Reply to Plaintiffs Objection to Order Dismissing Defendants Joe A Lamphiear and Susan M Lamphiear from this Action
3/12/2010	ORDR	BOOTH	Order Dismissing defendants Joe A. Lamphiear and Susan M. Lamphiear from this action
	CVDI	BOOTH	Civil Disposition entered for: Lamphiear, Joe A, Defendant; Lamphiear, Susan M, Defendant; James, Diana, Plaintiff. Filing date: 3/12/2010
3/17/2010	HRSC	BOOTH	Hearing Scheduled (Motion for Summary Judgment 05/20/2010 03:00 PM) set by defendant Lamphiear
3/18/2010	PLWL	CRUMPACKER	Plaintiff's Expert Witness Disclosure
	NTSV	CRUMPACKER	Notice Of Service
	AMCO	SREED	Amended Complaint and Demand for Jury Trial Filed
	SUMI	SREED	ANOTHER Summons Issued
3/29/2010	MOTN	HUFFMAN	Defendants Lamphiears Motion for Summary Judgment to Dismiss Crossclaim by Defendants Merceas & Notice of Hearing
	MISC	HUFFMAN	Defendants Lamphiears Statement of Uncontested Material Facts on Crossclaim by Defendants Merceas
	MEMO	HUFFMAN	Memorandum in Support of Defendants Lamphiears Motion for Summary Judgment to Dismiss Crossclaim by Defendants Merceas

Diana James vs. Cornelius Mercea, Patricia Mercea, Joe A Lamphiear, Susan M Lamphiear, First American Title Insurance Company

Date	Code	User	Judge
3/29/2010	AFFD	HUFFMAN	Joint Affidavit of Joe Lamphiear & Susan Lamphiear in Support of Motion for Summary Judgment to Dismiss Crossclaim by Defendants Mercea
	FILE	HUFFMAN	New File ***** 4 ***** Created
4/5/2010	ORDR	BOOTH	Order re: Mercea's motion for summary judgment
	PLWL	BAXLEY	Plaintiff's Supplemental Expert Witness Disclosure
4/19/2010	AFFD	HUFFMAN	Affidavit of John P Whelan in Support of Plaintiff's Motion for Reconsideration/To Amend Order Re Mercea's Motion for Summary Judgment
	MEMO	HUFFMAN	Memorandum in Support of Plaintiffs' Motion for Reconsideration/To Amend Order Re Mercea's Motion for Summary Judgment
	MOTN	HUFFMAN	Merceas' Motion for Reconsideration & Notice of Hearing
	MOTN	HUFFMAN	Motion for Reconsideration/To Amend Order Re Mercea's Motion for Summary Judgment
4/20/2010	HRSC	BOOTH	Hearing Scheduled (Motion to Reconsider 05/25/2010 03:00 PM)
4/21/2010	NOTH	SHEDLOCK	Notice Of Hearing
4/22/2010	NOHG	CRUMPACKER	Merceas Amended Notice Of Hearing
4/26/2010	MISC	COCHRAN	Reply in Support of Defendants Lamphiears Motion for Summary Judgment on Crossclaim by Defendants Mercea
4/30/2010	MEMO	CRUMPACKER	Defendants Mercea's Memorandum in Support of Motion for Reconsideration
5/4/2010	FILE	LISONBEE	*****FILE 5 CREATED*****
5/5/2010	MEMO	HARWOOD	Mercea's Memorandum In Opposition To Lamphiear's Motion For Summary Judgment
	ANSW	HARWOOD	Answer To Amended Complaint And Crossclaim Of Defendants Mercea
5/10/2010	OBJT	SREED	Objection and Reply to Amended Crossclaim by Defendants Mercea Crossclaim on Crossclaimants Merceas
5/11/2010	NOHG	CRUMPACKER	Notice Of Hearing
5/17/2010	MISC	HARWOOD	Response To Plaintiff's Motion For Reconsideration
5/19/2010	HRVC	BOOTH	Hearing result for Motion for Summary Judgment held on 05/20/2010 03:00 PM: Hearing Vacated set by defendant Lamphiear
		BOOTH	Notice of Hearing

Diana James vs. Cornelius Mercea, Patricia Mercea, Joe A Lamphiear, Susan M Lamphiear, First American Title Insurance Company

Date	Code	User	Judge
5/25/2010	DCHH	BUTLER	Hearing result for Motion to Reconsider held on 05/25/2010 03:00 PM: District Court Hearing Held Court Reporter: ANNE MCMANUS Number of Transcript Pages for this hearing estimated: Whelan + Witherspoon Kelly for Mercea and Lamphiear - LESS THAN 200 PAGES
6/21/2010	NOAP	LISONBEE	Notice Of Appearance: Douglas S. Marfice For First American Title Company
		LISONBEE	Filing: 11 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Marfice, Douglas S. (attorney for First American Title Insurance Company) Receipt number: 0027258 Dated: 6/21/2010 Amount: \$58.00 (Check) For: First American Title Insurance Company (defendant)
6/25/2010	DEOP	BOOTH	Decision On Motion for Summary Judgment (Reconsideration)
7/6/2010	MEMO	CRUMPACKER	Affidavit & Memorandum of Costs & Attorneys Fees
7/8/2010	MISC	CLEVELAND	Defendant First American Title Company, Inc.s Answer to Plaintiffs Amended complaint & Demand for Jury Trial
7/9/2010	JDMT	BOOTH	Judgment dismissing crossclaims Merceas Crossclaim complaint as against Crossdefendants Lamphiears
	JDMT	BOOTH	Final judgment dismissing plaintiffs complaint as against defendants Mercea
	CVDI	BOOTH	Civil Disposition entered for: Mercea, Cornelius, Defendant; Mercea, Patricia, Defendant; James, Diana, Plaintiff. Filing date: 7/9/2010
	CVDI	BOOTH	Civil Disposition entered for: Lamphiear, Joe A, Defendant; Lamphiear, Susan M, Defendant; Mercea, Cornelius, Defendant; Mercea, Patricia, Defendant. Filing date: 7/9/2010
7/15/2010	HRSC	BOOTH	Hearing Scheduled (Motion to Reconsider 08/19/2010 03:00 PM)
7/20/2010	AFFD	SREED	Affidavit of John P. Whelan in Support of Plaintiff's Objections to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs
	AFFD	SREED	Affidavit of Diana James in Support of Plaintiff's Motion to Vacate Judgment/Reconsideration
	MEMO	SREED	Memorandum in Support of Plaintiffs' Motion to Vacate Judgment/Reconsideration
	MEMO	SREED	Memorandum in Support of Plaintiff's Objections to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs
	MOTN	SREED	Motion to Disallow Costs and Attorney Fees

Diana James vs. Cornelius Mercea, Patricia Mercea, Joe A Lamphiear, Susan M Lamphiear, First American Title Insurance Company

Date	Code	User		Judge
7/20/2010	MOTN	SREED	Motion to Vacate Judgment/Reconsideration	John P. Luster
	NOHG	SREED	Notice Of Hearing	John P. Luster
8/5/2010	MOTN	CRUMPACKER	Motion to Determine Attorneys Fees & Costs & Notice of Hearing	John P. Luster
	AFFD	CRUMPACKER	Affidavit of Edward J Anson re: Attorney Fees	John P. Luster
8/6/2010	MISC	BAXLEY	Response To Plaintiff's Motion To Vacate Judgment / Reconsideration	John P. Luster
	AFFD	BAXLEY	Second Joint Affidavit Of Cornelius Mercea and Patricia Mercea	John P. Luster
8/10/2010	AFFD	LISONBEE	Affidavit Edward J. Anson In Response To Plaintiff's Objection To Merceas' memorandum of Costs And Attorney's Fees	John P. Luster
8/19/2010	DCHH	BUTLER	Hearing result for Motion to Reconsider held on 08/19/2010 03:00 PM: District Court Hearing Held Court Reporter: ANNE MACMANUS Number of Transcript Pages for this hearing estimated: LESS THAN 250 PAGES - MOTIONS TAKEN UNDER SUBMISSION	John P. Luster
8/31/2010	DEOP	BOOTH	Memorandum Opinion and order re; plaintiffs motion to vacate judgment/reconsideration and Merceas motion to determine attorney fees and costs and plaintiffs motion to disallow costs and fees	John P. Luster
9/7/2010	MOTN	CLEVELAND	Stipulated Motion for Entry of an Amended Scheduling Order and Trial Date	John P. Luster
	ORDR	BOOTH	Order Granting Stipulated motion for entry of an Amended Scheduling Order and Trial Date	John P. Luster
	HRVC	BOOTH	Hearing result for Jury Trial Scheduled held on 09/13/2010 09:00 AM: Hearing Vacated 5 DAY JURY TRIAL	John P. Luster
	HRSC	BOOTH	Hearing Scheduled (Status Conference 10/20/2010 03:00 PM)	John P. Luster
		BOOTH	Notice of Hearing	John P. Luster
9/10/2010	ORDR	BOOTH	Order granting stipulated motion for entry of an amended scheduling order and trial date	John P. Luster
9/15/2010	JDMT	BOOTH	Supplemental Final Judgment dismissing Plaintiffs Complaint as against Defendants Mercea and Awarding Attorney fees and Costs	John P. Luster
	STAT	BOOTH	Case status changed: Closed pending clerk action	John P. Luster
	CVDI	BOOTH	Civil Disposition entered for: Mercea, Cornelius, Defendant; Mercea, Patricia, Defendant; James, Diana, Plaintiff. Filing date: 9/15/2010	John P. Luster
10/7/2010	BNDC	RICKARD	Bond Posted - Cash (Receipt 43778 Dated 10/7/2010 for 100.00)	John P. Luster

Date: 12/21/2010

First Judicial District Court - Kootenai County

User: LEU

Time: 12:50 PM

ROA Report

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Case: CV-2009-0000992 Current Judge: John P. Luster

Diana James vs. Cornelius Mercea, etal.

Diana James vs. Cornelius Mercea, Patricia Mercea, Joe A Lamphiear, Susan M Lamphiear, First American Title Insurance Company

Date	Code	User	Judge
10/7/2010		RICKARD	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Whelan, John P (attorney for James, Diana) Receipt number: 0043779 Dated: 10/7/2010 Amount: \$101.00 (Check) For: James, Diana (plaintiff)
	NOTC	RICKARD	Notice Of Appeal
	APDC	RICKARD	Appeal Filed In District Court
10/20/2010	DCHH	BOOTH	Hearing result for Status Conference held on 10/20/2010 03:00 PM: District Court Hearing Hel Court Reporter: Anne MacManus Number of Transcript Pages for this hearing estimated: under 100 pages
10/21/2010	BNDV	LEU	Bond Converted (Transaction number 2444 dated 10/21/2010 amount 100.00)
11/19/2010	FILE	ROSENBUSCH	*****New File #6 Created*****
	MISC	BAXLEY	Estimated Cost for Preparation of Court Reporter's Transcript
12/15/2010	BNDC	LISONBEE	Bond Posted - Cash (Receipt 52969 Dated 12/15/2010 for 725.00)
12/16/2010	NLTR	BOOTH	Notice of Lodging Transcript - 150 pages hearings 2/4/10, 5/25/10 and 8/19/10

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STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2010 MAR 29 PM 12:43

Joe and Susan Lamphiear
1021 Crestline Drive
Coeur d' Alene, Idaho 83814

CLERK, DISTRICT COURT

Sherry Huffman
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN
AND FOR THE COUNTY OF KOOTENAI

Diana James,
Plaintiff,
vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A
LAMPHIEAR and SUSAN M LAMPHIEAR
husband and wife, FIRST AMERICAN TITLE
INSURANCE CO.

Defendants

Case No. CV-09-992

DEFENDANTS LAMPHIEARS STATEMENT
OF UNCONTESTED MATERIAL FACTS ON
CROSSCLAIM BY DEFENDANTS MERCEAS

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife

Crossclaimants,

vs.

JOE A LAMPHIEAR and SUSAN M
LAMPHIEAR, husband and wife

Crossdefendants,

² That Defendants Lamphiears herewith submit their statement of uncontested material facts:

1. That Lamphiears purchased Lot 1 and 2 Block 1 Cherry Heights in 2004 (Lamphiears Affidavit Exhibit "A")

2. That Defendants Lamphiears built the home that is located on a parcel of real property located at : 1111 Crestline Drive, Coeur d' Alene ID. 83814, More particularly described as follows:

Lot 2 Block 1 Cherry Heights, according to the plat recorded in the office of the recorded in the office of the County Recorder in Book "E" of Plats at Page 9, records of Kootenai County, Id.

3. That the above described property consisted of a single-family residence. Access to the property was provide by a driveway located upon the above describe property, public right-of-way intersected with driveway, on one end and intersected with Crestline Drive on the other end. Each within defined boundaries of one another. (Lamphiears Affidavit Exhibit "E")

That public right-of-way gives access to the following:

A) Lot 2 Block 1 Cherry Heights (Plaintiffs Lot) public right-of-way is the primary access to driveway upon Lot.

B) Lot 1 Block 1 Cherry Heights, a undeveloped lot lying to the east of Plaintiffs property, public right-of-way is the primary access to driveway upon lot.

C) Lot 3 has incorporated the public right-of -way to create a circle drive for their property.

Primary access to home is off of Crestline Drive.

D) Lot 1 Cherry Heights 1st addition has use of public right-of-way to access the back of their lot which has a gated area. Primary access to home is off of Crestline Drive.

That Lamphiears where required by the City of Coeur d' Alene as a part of the construction of

² Defendants Lamphiears Statement of Uncontested Facts on crossclaim

³ the homes to pave the public right-of-way as per City of Coeur d' Alene code: 17.44.310 (Paving A) and was shown to be in compliance of above code by receiving a (CO) Certificate of occupancy in March of 2006.(Lamphiears Affidavit Exhibit "D, E,").

4. That during March of 2006 above described home was purchase by Defendant Merceas and where conveyed a Warranty Deed from Defendants Lamphiears.(Lamphiears Affidavit Pg.5 Par 4, Exhibit "J").

5. That in March of 2008 above described home was purchase by Plaintiff and was conveyed a Warranty Deed April of 2008 from Defendants Merceas (Lamphiears Affidavit Exhibit "K")

6. That Plaintiff has clear title to above described home regardless of her allegations stating otherwise, Plaintiff holds the title free and simple. (Lamphiears Affidavit Exhibit "K")

7. That attached to Lamphiears Affidavit as (Exhibit "A, J, K") Shows the chain of title, as

1) (Exhibit "A ") Conveyed to Lamphiears, Dated August 6, 2004

2) (Exhibit "J") Lamphiears conveyed to Merceas, Dated March 13, 2006

3) (Exhibit "K") Merceas conveyed to Diana James, (Plaintiff), Dated April 4, 2008

8. That there has been no breach of warranty of any title in the above chain of title.

9. That Lamphiears had no Knowledge of a Diana James (Plaintiff) or of her existence, prior to the purchase of Merceas home.

10. That Lamphiears where not a party to the sell of Merceas home to Plaintiff, had any

³ Defendants Lamphiears Statement of Uncontested Facts on crossclaim

⁴ knowledge of Plaintiff intentions, interest, offers in purchasing Merceas home. Had never knew of, met with, spoke with, at the time or anytime Plaintiff was considering the purchase of Merceas home.

(Lamphiears Affidavit Pg.6 Par. 3). Attached to Memorandum (Diana James Affidavit Exhibit "1" Pg.2, Par. 2, 3,). Shows the only sellers as the Merceas.

11. That Lot 2 Block 1 Cherry Heights at the time Plaintiff was considering purchasing all corners of lot had survey stakes, tips of stakes bright pink in color, pink ribbons tied around the tops all in plain sight, to touch, see, read, that are present to this day. (Lamphiears Affidavit Exhibit "G, H")

12. That attached as Exhibit "H" to Lamphiears Affidavit are 6 Photographs which depict the following: That yellow crime tape was attached to survey stakes that are there and present to this date to show the defined boundaries between the private properties and public right-of-way. Each picture has narrations on them as to what each picture is referring to. The pictures clearly show Plaintiffs three front corner markers. A driveway within Plaintiffs Lot and the public right-of-way outside Plaintiffs lot that connects to Crestline Drive. If pictures are compared to the recored plat in book "E" of Plats at page 9 record of Kootenai County, Idaho. The pictures depict the same lay out as shown on plat plan (Lamphiears Affidavit Exhibit "E, F, G, I") all have a Plat of above recored plat.

13. That Lamphiears hired Meckel Engineering before the purchase of Lot 1 and 2 Block 1 Cherry Heights, to do a corner location, monuments were verified to be in the correct position (Lamphiear Affidavit Exhibit "F").

14. That Plaintiff did not prior to the purchasing Merceas home hire a professional Engineer to

⁴ Defendants Lamphiears Statement of Uncontested Facts on crossclaim

5 come out and do a corner location.

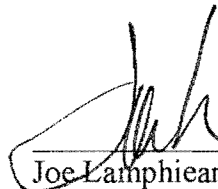
15. That Plaintiff did not prior to the purchasing Merceas home hire a professional Engineer to come out and do a corner location.


16. That on March 2nd 2010 Plaintiff filed a Motion To Dismiss Defendants Lamphiears from all claims Plaintiff alleged in her Complaint and demand for Jury Trail.(Attached Hereto as Exhibit "A"

17. That on March 3rd 2010 Summary Judgment was heard by the Court, Dismissing Lamphiears of all claims Plaintiff alleged in her Complaint and demand for Jury Trail.

18. That on March 8th Order Dismissing Lamphiears was Signed by *Honorable John P. Luster* THEREBY, Dismissing Lamphiears from this action of all allegation made by Plaintiff against Lamphiears in her Complaint and demand for Jury Trail.(Exhibit "3" Memorandum)

Dated this 29th day of March, 2010


Joe Lamphiear (Pro Se)


Susan Lamphiear (Pro Se)

CERTIFICATE OF SERVICE

I certify that on this 21st day of March, 2010, I caused a true and correct copy of DEFENDANTS LAMPHEARS STATEMENT OF UNCONTEST MATERIAL FACTS to be forwarded with all required charges prepaid, by method(s) indicated below, to the following person(s).

John P Whelan
213 N. 4th Street
Coeur d' Alene, Id. 83814

Attorney for Plaintiff

☐ U.S. Mail, Postage Paid
☒ Hand Delivered
☐ Overnight Mail
☐ E-Mail

Edward J Anson
Witherspoon, Kelly, Davenport & Toole, P.S.
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d' Alene Id. 83814-2146

Attorneys for defendants Mercea

☐ U.S. Mail, Postage Paid
☒ Hand Delivered
☐ Overnight Mail
☐ E-Mail
☐ Fax


Sue Lamphiear

EXHIBIT A

Plaintiffs Motion To Dismiss
Defendants Lamphiear

EXHIBIT A

EXHIBIT A

EXHIBIT A

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d' Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife, FIRST
AMERICAN TITLE INSURANCE CO.,

Defendants.

CASE NO. CV-09-992

PLAINTIFF'S MOTION TO
DISMISS DEFENDANTS
LAMPHEAR

Hearing Date: March 4, 2010

Time: 3:00 p.m.

Judge: John P. Luster

COMES NOW, the Plaintiff, Diana James, by and through her attorney of record, John P. Whelan, and moves this Court pursuant to I.R.C.P. 41(a)(2) to dismiss Defendants Joe A. Lamphiear and Susan M. Lamphiear from the pending action. This motion is made on the grounds that Defendants Lamphiear have filed a motion for summary judgment without stating the grounds for the motion. Upon review of the motion, and in light of the cross-claim by PLAINTIFF'S MOTION TO DISMISS DEFENDANTS LAMPHEAR- 1

Defendants Mercea against the Defendants Lamphiear, Plaintiff believes that it would be in the interests of justice to dismiss Plaintiff's claim against the Lamphiears.

Plaintiff has filed no opposition to the motion for summary judgment of the Lamphiears.

Plaintiff requests oral argument on this motion.

DATED this 2nd day of ^{March}~~February~~, 2010.

JOHN P. WHELAN, P.C.

By: John P. Whelan
John P. Whelan

PLAINTIFF'S MOTION TO DISMISS DEFENDANTS LAMPHIEAR- 2

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2 day of March, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Edward J. Anson
708 Northwest Blvd., Suite 401
Coeur d'Alene, ID 83814

- ☐ U.S. Mail, Postage Prepaid
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☒ Facsimile to: 667-8470

Lynette M. Davis
John K. Olson
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617

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☐ Hand Delivered
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☒ Facsimile to: (208) 954-5248

Joe Lamphiear and Susan Lamphiear
1021 Crestline Drive
Coeur d'Alene, ID 83814

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile to:


Jessica Tvrdy

1
2
3 Edward J. Anson, ISB No. 2074
4 WITHERSPOON KELLEY
5 The Spokesman Review Building
6 608 Northwest Blvd., Suite 300
7 Coeur d'Alene, Idaho 83814-2146
8 Telephone: (208) 667-4000
9 Facsimile: (208) 667-8470

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED: 11/15/99 1:55
10 O'CLOCK A.M.
11 DISTRICT COURT
12 DEPUTY

13 *Attorneys for Defendants*
14 *Cornelius Mercea and Patricia Mercea*

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHEAR and SUSAN M. LAMPHEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

ORDER RE MERCEA'S MOTION
FOR SUMMARY JUDGMENT

1 This matter came on for hearing in open Court on the 4th day of February, 2010, upon
2 Defendants Cornelius and Patricia Mercea's Motion for Summary Judgment. The Plaintiff,
3 Diana James, was represented by John P. Whelan. Defendants Cornelius and Patricia Mercea
4 were represented by Edward J. Anson. Defendants Joe A. Lamphiear and Susan M. Lamphiear
5 represented themselves. Defendant First American Title Insurance Company was represented
6 by John K. Olsen.
7

8 Having reviewed the records and files herein, and having heard and considered the
9 argument of Counsel and Parties this Court hereby Orders, Adjudges, and Decrees as follows:
10

11 **Findings of Fact**

12 1. The Plaintiff purchased from Defendants Merceas a parcel of real property
13 located at 1111 Crestline Drive, Coeur d'Alene, Idaho more particularly described as follows:
14

15 **Lot 2, Block 1, CHERRY HEIGHTS, according to the plat**
16 **recorded in the office of the County Recorder in Book "E" of**
Plats at Page 9, records of Kootenai County, ID.

17 2. That the above described property consisted of a single family residence. Access
18 to the property was provided by a driveway located upon the property that intersected with a
19 public easement that ran in a northerly direction and connected to Crestline Drive. The public
20 easement provides additional access to Lot 3, which lies to the north of Lot 2, Lot 1, which lies
21 to the south of Lot 2, and that property located across the easement from the subject property.
22 At the time that the Merceas purchased the property, and at the time that the Merceas sold the
23 property, use of the public easement by those adjoining properties was obvious. On the property
24 located across the public easement from Lot 2 was a fenced area containing two sheds and two
25 gates providing access to the public easement.
26
27
28

1 3. That neither of the Merceas nor their real estate agent ever made any
2 representation to the Plaintiff as to the location of the driveway upon the subject property and
3 the location of the public easement that connects to the driveway.

4
5 4. That prior to entering into an agreement to purchase the property, the Plaintiff
6 inspected the property on one or more occasions.

7 5. That an inspection of the subject real property would reveal that the property
8 effectively had no front yard. An inspection would further reveal that the public easement was
9 being used by three other parties.

10
11 6. That in connection with the sale of the property the Defendants Merceas caused
12 a Seller's Property Disclosure form to be delivered to the Plaintiff. That the Plaintiff failed to
13 give written notice of rescission to the Defendant Merceas within three business days from
14 receiving the Property Disclosure form.

15
16 7. That the Plaintiff purchased Lot 2 of a certain subdivision and she obtained Lot 2
17 of that certain subdivision according to the recorded plot thereof.

18 8. There is no evidence that the Defendant Merceas had knowledge that the
19 Plaintiff entered into the Purchase Agreement for the subject real property under a mistaken
20 understanding as to the nature and extent of the private driveway running to the public
21 easement which in turn runs to a public street.

22
23 9. The recorded plat pertaining to the subject real property gives notice of the
24 public easement line to the east of the subject property.

25 **Conclusions of Law**

26 1. That the Plaintiff has clear title to the real property that she purchased from the
27 Merceas. That there exists no defect in her title to the real property.
28

1 2. That there are no encroachments upon the real property that Plaintiff purchased
2 from the Merceas.

3 3. That the recorded plat pertaining to the subject real property gives constructive
4 notice to all purchasers of its contents pursuant to Idaho Code § 55-811.

5 4. That the Merceas have committed no violation of the Idaho Property Condition
6 Disclosure Act as set forth in Idaho Code § 55-2501.

7 5. That rescission is not a remedy available to the Plaintiff.

8 6. That the Defendants Merceas have committed no actual fraud.

9 7. That a contested issue of material fact exists as to whether or not the Merceas
10 were under a duty to disclose to Plaintiff that what appeared to her to be her driveway was in
11 fact predominately a public easement.

12
13
14 Conclusion

15 On the basis of the foregoing the Defendant Merceas Motion for Summary Judgment
16 dismissing the claims of Plaintiff is hereby granted as to all causes of action other than that
17 claim of Plaintiff for constructive fraud in the nondisclosure of the status of the driveway and
18 the public easement.

19
20 Dated this 25th day of March, 2010.

21 John P. Luster
22 John P. Luster
23 District Judge
24
25
26
27
28

CLERK'S CERTIFICATE OF SERVICE

I certify that on this the 5th day of March, 2010, I caused a true and correct copy of the ORDER RE MERCEA'S MOTION FOR SUMMARY JUDGMENT to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
Counsel for Plaintiff

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☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile: (208) 664-2240

Joe and Sue Lamphiear
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Pro Se

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☐ Hand Delivered
☐ Overnight Mail
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P.O. Box 1617
Boise, Idaho 83701-1617
Counsel for First American Title, Co.

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Edward J. Anson
Witherspoon Kelley
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814
Counsel for Cornelius and Patricia Mercea

☐ By Hand Delivery
☐ By U.S. Mail
☐ By Overnight Mail
☒ By Facsimile: (208) 667-8470

Clerk of District Court

By: 

Deputy Clerk

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d' Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED 560

2010 APR 19 PM 2:39

CLERK DISTRICT COURT

DEPUTY *Sherry Hefner*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife, FIRST
AMERICAN TITLE INSURANCE CO.,

Defendants.

CASE NO. CV-09-992

AFFIDAVIT OF JOHN P. WHELAN
IN SUPPORT OF PLAINTIFF'S
MOTION FOR
RECONSIDERATION/TO AMEND
ORDER RE MERCEA'S MOTION
FOR SUMMARY JUDGMENT

STATE OF IDAHO)

) ss.

County of Kootenai)

John P. Whelan, being first duly sworn deposes and says:

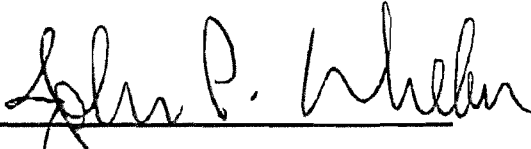
AFFIDAVIT OF JOHN P. WHELAN IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION/TO
AMEND ORDER RE MERCEA'S MOTION FOR SUMMARY JUDGMENT- 1

1. I am the attorney for the Plaintiff, Diana James, in this action. I have personal knowledge of the following facts and could competently testify.

2. The Defendants Mercea filed a motion for summary judgment on December 11, 2009. An opposition to the motion was filed by Plaintiff. The motion for summary judgment was heard by the Court on February 4, 2010. The Court denied Defendants motion for summary judgment and ordered Defendants' counsel to prepare an order. An order was apparently prepared nearly sixty days later and submitted to the Court. No copy of the proposed order was served on my office. I first saw the proposed order only after the order had been signed by the Court and filed.

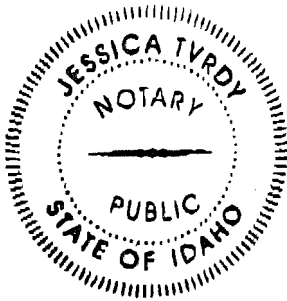
3. The order is not an accurate recital of what the Court found at the hearing. My client requests that the Court vacate, amend and reconsider the order and enter an order specifying only that Defendants motion for summary judgment is denied.

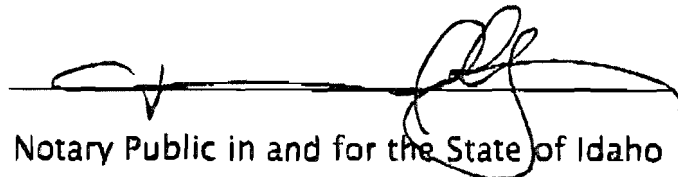
DATED this 19 day of April, 2010.



John P. Whelan

Subscribed and sworn before me this 19 day of April, 2010.




Notary Public in and for the State of Idaho
Residing at: Post Falls
My Comm. Expires: 12/29/11

CERTIFICATE OF SERVICE

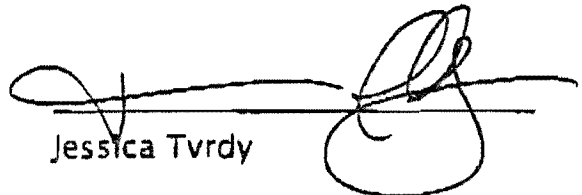
I HEREBY CERTIFY that on the 19 day of April, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Edward J. Anson
708 Northwest Blvd., Suite 401
Coeur d'Alene, ID 83814

- ☐ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☒ Facsimile to: 667-8470

Joe Lamphiear and Susan Lamphiear
1021 Crestline Drive
Coeur d'Alene, ID 83814

- ☒ U.S. Mail, Postage Prepaid
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Facsimile to:


Jessica Tvrdy

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED }
God

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CLERK DISTRICT COURT
Sherry Halpin
DEPUTY

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d' Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife, FIRST
AMERICAN TITLE INSURANCE CO.,

Defendants.

CASE NO. CV-09-992

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
RECONSIDERATION/TO AMEND
ORDER RE MERCEA'S MOTION
FOR SUMMARY JUDGMENT

Hearing Date:

Time:

Judge: John P. Luster

Plaintiff, Diana James, submits the following memorandum in support of
Plaintiff's motion for reconsideration/to amend order re Mercea's motion for
summary judgment:

STATEMENT OF CASE

Defendants, Cornelius Mercea and Patricia Mercea, filed their motion for summary judgment on December 11, 2009. The motion was very non-specific as to what the Defendants were attempting to establish by way of their motion for summary judgment. Some further detail was provided in Defendants' "reply" brief. At the hearing on the motion, the Court made comments about some of the issues germane to the case, including the remedies provided by I.C. 55-2501 et seq. However, the Court denied Defendants Mercea summary judgment on the issue of whether or not Defendants had a duty to disclose relevant facts about the "public right of way" at issue in the case.

Defendants apparently submitted a proposed order to the Court nearly sixty (60) days after the hearing. Plaintiff's counsel was not supplied a copy of the proposed order. Plaintiff's counsel first saw the proposed order only after the Court had signed and filed the order. The order is objectionable because it includes "findings of fact" and "conclusions of law" outside of the findings made by the Court. Including particularly the "conclusion" that the remedy of rescission is not available to the Plaintiff.

WHAT PLAINTIFF SEEKS

By virtue of this motion, Plaintiff requests the Court to vacate, amend and modify the order signed and filed on April 5, 2010 in the instant action by striking the findings and conclusions in favor of a simple denial of summary

judgment on the one and ^{only} ground asserted in support of the Defendants' Motion for Summary Judgment—the complaint failed to state a cause of action (No other ground was asserted in support of Defendants' motion).

DATED this 19 day of April, 2010.

JOHN P. WHELAN, P.C.

By: John P. Whelan

John P. Whelan

Attorney for Plaintiff

CERTIFICATE OF SERVICE

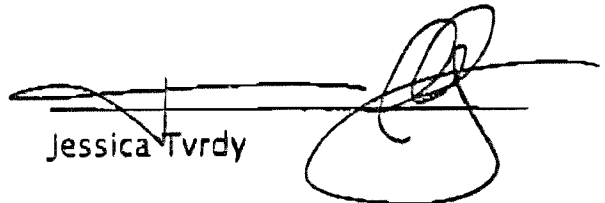
I HEREBY CERTIFY that on the 19 day of April, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Edward J. Anson
708 Northwest Blvd., Suite 401
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Coeur d'Alene, ID 83814

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- ☐ Hand Delivered
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- ☐ Facsimile to:


Jessica Tvrdy

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500

CLERK DISTRICT COURT

Sherry Huff
DEPUTY

*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

NO. CV-09-992

**MERCEAS' MOTION FOR
RECONSIDERATION AND
NOTICE OF HEARING**

vs.

Defendants.

Crossclaimants.

VS.

Crossdefendants.

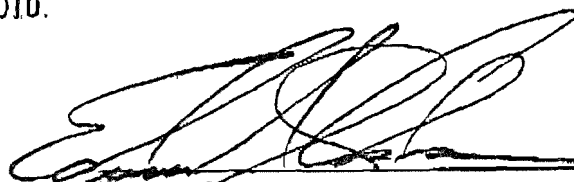
COMES NOW, the Defendants Cornelius and Patricia Mercea, by and through their attorney of record, Edward J. Anson of Witherspoon Kelley, and pursuant to I.R.C.P. 11(a)(2)(B) respectfully moves this Court for reconsideration of that portion of the Court's Order re Merceas' Motion for Summary Judgment entered on April 5, 2010 which stated:

7. That a contested issue of material fact exists as to whether or not the Merceas were under a duty to disclose to Plaintiff that what appeared to her to be her driveway was in fact predominately a public easement.

This motion is made on the ground and on the basis that the issue of whether or not the Merceas were under a duty to disclose is a question of law and not an issue of fact. The Merceas thus respectfully submit that as a matter of law they were under no duty to disclose, and that as such Defendant Merceas' Motion for Summary Judgment should have been granted in its entirety and by this motion the Merceas respectfully request this Court to do so.

Pursuant to I.R.C.P. 7(b)(3)(C) the Defendant Merceas give notice of their intention to file a Brief in support of this motion within 14 days and further give notice of their intention to present oral argument at the hearing upon this motion.

DATED this 19 of April, 2010.



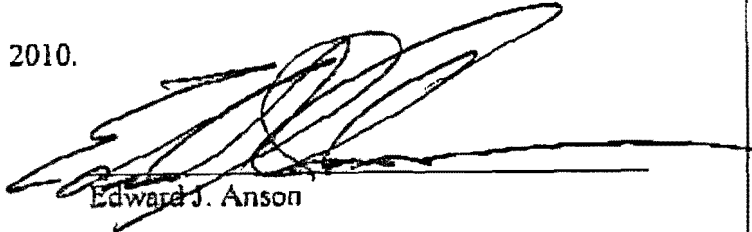
Edward J. Anson
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146

Attorneys for the Defendants Mercea

NOTICE OF HEARING

YOU ARE HEREBY NOTIFIED that a hearing on Defendant Merceas' Motion for Reconsideration will be held at the Kootenai County Court House, Coeur d'Alene, Idaho, on the 20th day of May, 2010, at the hour of 3:00 p.m. before Honorable John P. Luster at the Kootenai County Courthouse located at 324 W. Garden Avenue, Coeur d'Alene, Idaho, or as soon thereafter as counsel may be heard at which time said motion will be considered.

DATED this 4th day of April, 2010.


Edward J. Anson

CERTIFICATE OF SERVICE

I certify that on this the 9th day of April, 2010, I caused a true and correct copy of Merceas' Motion for Reconsideration and Notice of Hearing to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
Counsel for Plaintiff

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☒ Facsimile: (208) 664-2240

Joe and Sue Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814
Pro Se

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile:


Tina Marie Bell

STATE OF IDAHO
COUNTY OF KOOTENAI
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SS
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CLERK DISTRICT COURT

Cherry Hulse
DEPUTY

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d' Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE
A. LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife,
FIRST AMERICAN TITLE
INSURANCE CO.,

Defendants.

CASE NO. CV-09-992

MOTION FOR
RECONSIDERATION/TO AMEND
ORDER RE MERCEA'S MOTION FOR
SUMMARY JUDGMENT

Hearing Date:

Time:

Judge: John P. Luster

COMES NOW, the Plaintiff, Diana James, by and through her attorney of record, John P. Whelan, and moves this Court pursuant to I.R.C.P. 11(a)(2), 52(b) and 60(a) to reconsider and amend the order filed by the Court on April 5, 2010 in accordance with the partial granting of summary judgment to Defendants

Mercea. This motion is made on the grounds that Plaintiff was not served a copy of the proposed order at the time it was submitted to the Court contrary to I.R.C.P. Rule 77(d). This motion is made on the further grounds that the order that was submitted to the Court by the moving party (Defendants Mercea) does not comply with the Court's pronouncements at the hearing of the motion. Specifically, the long list of "findings" were not made at the hearing on Defendants' Merceas' motion for summary judgment. In particular, the following "findings" and "conclusions" are objectionable and should be stricken from the order filed April 5, 2010:

1. Paragraph 2, second through fourth sentences;
2. Paragraph 3;
3. Paragraph 5;
4. Paragraph 6;
5. Paragraph 7;
6. Paragraph 8; and
7. Paragraph 9.

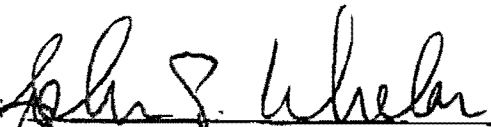
Conclusions of Law contested as objectionable and not found at the hearing of this matter:

1. Paragraphs 4-6.

Plaintiff requests oral argument on this motion.

DATED this 19th day of April, 2010.

JOHN P. WHELAN, P.C.

By: 
John P. Whelan

CERTIFICATE OF SERVICE

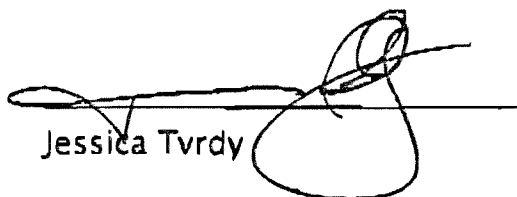
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- ☐ Facsimile to:


Jessica Tvrdy

STATE OF IDAHO
COUNTY OF KOOTENAI
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CLERK DISTRICT COURT

DEPUTY

Joe and Susan Lamphiear
1021 Crestline Drive
Coeur d' Alene, Idaho 83814

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN
AND FOR THE COUNTY OF KOOTENAI

Diana James,
Plaintiff,
vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A
LAMPHIEAR and SUSAN M LAMPHIEAR
husband and wife, FIRST AMERICAN TITLE
INSURANCE CO.

Defendants

Case No. CV-09-992

REPLY IN SUPPORT OF DEFENDANTS
LAMPHIEARS MOTION FOR SUMMARY
JUDGMENT ON CROSSCLAIM BY
DEFENDANTS MERCEA

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife

Crossclaimants,

vs.

JOE A LAMPHIEAR and SUSAN M
LAMPHIEAR, husband and wife

Crossdefendants,

Joe Lamphiear and Susan Lamphiear (Pro Se) (henceforth "Lamphiears") herewith submit this
Reply in Support of Defendants Lamphiears Motion for Summary Judgment on Crossclaim by

I Reply in support of Defendants Lamphiears Motion for Summary Judgment on Crossclaim

² Defendants Cornelius Mercea and Patricia Mercea (henceforth “Merceas”).

CIVIL RULE 7.1 MOTION PRACTICE

As Per Civil Rule 7.1 (c) Motion Practice, Requirements for Submission – Responding Party (Par. 1,2,3): *Merceas failed to respond to Lamphiears Motion for Summary Judgment on Crossclaim*, in the allowed twenty-one (21) days.

As Per Civil Rule 7.1 (e) Motion Practice Effects of failure to comply with rules of Motion Practice. In the event an adverse party fails any response documents required to be filed under this rule in a timely manner, such failure may be deemed to constitute a consent to the sustaining of said pleading or the granting of said motion or other application. In addition, the court, upon Motion or its own initiative, may impose sanctions in the form of reasonable expenses incurred, including attorney fees, upon the adverse party and/or counsel for failure to comply with this rule.

Merceas, non reply to Lamphiears Summary Judgment on crossclaim, shows there is no genuine evidence to support Merceas Crossclaim against Lamphiears, or is there any contested facts by Merceas, regarding the Facts, Findings, Exhibits, Affidavits that support the Motion for Summary Judgment on Crossclaim.

Lamphiears are entitled to be dismissed and granted Summary Judgment on Crossclaim as per Civil Rule 7.1 (e) Motion Practice, in THAT Merceas failed to comply with Civil Rule 7.1 (c) Motion Practice.

Therefor Lamphiears move the Court to award Summary Judgment in favor of Lamphiears, dismissing all allegation and claims against Lamphiears with Prejudice.

² Reply in support of Defendants Lamphiears Motion for Summary Judgment on Crossclaim

CROSSCLAIM

Merceas Crossclaim is built upon Plaintiffs alleged allegation against Lamphiears in her Complaint and Demand for Jury Trial, all which have been proven to hold no merit dismissing Lamphiears of all claims by Plaintiff, by/through:

1. Plaintiff filed no opposition to Lamphiears Motion for Summary Judgment.
2. That on March 2nd 2010 Plaintiff filed a Motion To Dismiss Defendants Lamphiears from all claims, Plaintiff alleged against Lamphiears in her Complaint and Demand for Jury Trial.
(Exhibit "A" Statement of Uncontested Material Facts.
3. That on March 3rd 2010 Summary Judgment was heard by the Court, Dismissing Lamphiears of all claims Plaintiff alleged against Lamphiears in her Complaint and Demand for Jury Trial.
4. That on March 8th Order Dismissing Lamphiears was Signed by *Honorable John P. Luster*
THEREBY, Dismissing Lamphiears from this action of all allegation made by Plaintiff against Lamphiears in her Complaint and Demand for Jury Trial.(Exhibit "3" Memorandum)

Neither Plaintiff nor Merceas filed a opposition contesting any Facts, Findings, Exhibits, Affidavits that support the Motion for Summary Judgment or Motion for Summary Judgment on Crossclaim, Therefor Lamphiears move the Court to dismiss Crossclaim in favor of Lamphiears as a matter of Law in this action.

4


CONCLUSION

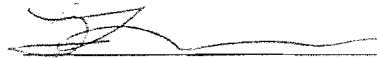
Lamphiears are entitled to Summary Judgment on Crossclaim, Pursuant to Idaho Rule of Civil Procedures 56 on the grounds and for the reason that there are no genuine issues of material facts as to the causes of action by Merceas against the Lamphiears and the Crossclaim of the Merceas against Lamphiears fails to state a claim upon which relief may be granted such that Lamphiears are entitled to Summary Judgment dismissing this action and allegation against them as a matter of Law.

Lamphiears are entitled to be dismissed from this action and granted Summary Judgment on Crossclaim as per Civil Rule 7.1 (e) Motion Practice, in THAT Merceas failed to comply with Civil Rule 7.1 (c) Motion Practice.

Lamphiears move the Court to grant Summary Judgment in favor of Lamphiears on Merceas Crossclaim as a matter of Law releasing Lamphiears of all claims against them in this action with Prejudice.

DATED this 26TH day of April 2010


Joe Lamphiear


Susan Lamphiear

CERTIFICATE OF SERVICE

I certify that on this 20TH day of APRIL, 2010, I caused a true and correct copy of
REPLY IN SUPPORT OF DEFENDANTS LAMPHEARS MOTION FOR SUMMARY JUDGMENT
ON CROSSCLAIM BY DEFENDANTS MERCEA to be forwarded with all required charges prepaid,
by method(s) indicated below, to the following person(s).

John P Whelan
213 N. 4th Street
Coeur d' Alene, Id. 83814

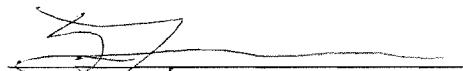
Attorney for Plaintiff

☐ U.S. Mail, Postage Paid
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☐ Overnight Mail
☐ E-Mail

Edward J Anson
Witherspoon, Kelly, Davenport & Toole, P.S.
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d' Alene Id. 83814-2146

Attorneys for defendants Mercea

☐ U.S. Mail, Postage Paid
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☐ E-Mail
☐ Fax


Sue Lamphiear

2010/09/30 PM 3:25

CLERK DISTRICT COURT
DEPUTY

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The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Telephone: (208) 667-4000
Facsimile: (208) 667-8470

*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M. LAMPHIEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

DEFENDANTS MERCEA'S
MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION

This Court's Order re Mercea's Motion for Summary Judgment stated in part:

1 7. That a contested issue of material fact exists as to whether
2 or not the Merceas were under a duty to disclose to Plaintiff that
3 what appeared to her to be her driveway was in fact predominately
4 a public easement.

5 The Merceas are now asking this Court to reconsider that portion of the Order.

6 The existence of a duty is a question of law and is not a question of fact. As a question
7 of law, the determination of the existence of a duty must be made by the Court. *Turpen v.*
8 *Granieri*, 133 Idaho 244, 985 P.2d 669 (1990); *Nation v. State*, 144 Idaho 177, 158 P.3d 953
9 (2007); *Boots Ex Rel. Boots v. Winters*, 145 Idaho 389, 179 P.3d 352 (App. 2008). Perhaps the
10 best explanation of this point is given by Justice Huntley in his concurring opinion in *Toner v.*
11 *Lederle Laboratories*, 112 Idaho 328, 732 P.2d 297 (1987):

12 [T]he question of "duty" is not for the jury, rather it is a question of law for
13 the court to decide. Essentially, the question of the existence of a duty involves a
14 legal determination that some relationship exists between the defendant and the
15 plaintiff which gives rise to an obligation of conduct toward a particular person in
16 the first instance. Duty is a question of whether the defendant is under any
17 obligation for the benefit of the particular plaintiff. Whether the interest of the
18 plaintiff which has suffered invasion was entitled to legal protection at the hands
19 of the defendant is entirely a question of law to be determined by reference to the
20 body of statutes, rules, principles and precedents which make up the law; and it
21 must be determined only by the court. The court is required to determine if,
22 under the facts of a given case a duty is owed by defendant to plaintiff and, also,
23 to determine the scope or extent of that duty... The existence of 'duty' is a
24 question of law. Legal duties are not discoverable facts of nature, but merely
25 conclusory expressions that, in cases of a particular type, liability should be
26 imposed for damage. at 112 Idaho 348 (citations deleted).

27 Similar results were likewise reached in *O'Guin v. Bingham County*, 142 Idaho 49, 122
28 P.3d 308 (2005); and *Bramwell v. South Rigby Canal Company*, 136 Idaho 648, 39 P.3d 588
(2001).

 Whether a duty has been breached is a question of fact, but the determination of whether
or not the duty exists must first be made by the Court. Undersigned counsel is mindful of the
fact that the offending language in the Order to which the Merceas seek reconsideration was in

1 fact written by him and that at first blush it appears somewhat disingenuous to be asking the
2 Court for reconsideration. However, the Court appeared to be articulating the thought that there
3 were contested issues of fact which precluded the Court from granting summary judgment upon
4 the Plaintiff's constructive fraud claim. Upon closer analysis it appears that there are in fact no
5 contested issues of fact, but only a contested issue of law.

6 A constructive fraud claim arises when there is a duty to disclose. A constructive fraud
7 claim has been held to be in essence a breach of a fiduciary duty. *McGhee v. McGhee*, 82 Idaho
8 367, 353 P.2d 760 (1960); *Hines v. Hines*, 129 Idaho 847, 934 P.2d 20 (1997); and *Country*
9 *Cove Development v. May*, 143 Idaho 595, 150 P.3d 288 (2006).

10 In the real estate sale setting a duty to disclose has been found in three settings:

11 (1) If there is a fiduciary or other similar relationship of trust and confidence between
12 the two parties;

13 (2) In order to prevent a partial statement of the facts from being misleading; or

14 (3) If a fact known by one party and not the other is so vital that if the mistake were
15 mutual the contract would be voidable, and the party knowing the fact also knows
16 that the other does not know it. *Sowards v. Rathbun*, 134 Idaho 702, at 707, 8 P.3d
17 1245 (2000); and *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966).

18 In *Sowards* the Court found that there was no duty to disclose on the part of a seller of
19 real property when the facts were as follows:

20 [T]he *Sowards* have not established the existence of any special
21 relationship of this type between Rathbun and Sowards. In particular, the
22 *Sowards* have not proven: (a) the existence of a fiduciary relationship between
23 Rathbun and Sowards; (b) that Rathbun made any partial or ambiguous statement
24 which, not elaborated upon, would have been misleading; (c) that Rathbun
25 obtained any information subsequently which would have made a previous
26 representation untrue or misleading; (d) that Rathbun, or anyone else, made a
27 false representation and that Rathbun knew that Sowards would rely on that
28 representation; or (e) that Rathbun knew that Sowards was about to enter into the
transaction under a mistake of fact. at 134 Idaho 707.

The *Sowards* facts are exceedingly similar to the facts at hand.

1 Idaho law has established that no fiduciary duty ordinarily arises between parties to an
2 arm's length business transaction. *Baker Farms v. LDS, Corp.*, 136 Idaho 922, 42 P.3d 715
3 (App. 2002). In *Idaho First National Bank v. Bliss Valley Foods*, 121 Idaho 266, at 277, 824
4 P.2d 841 (1992) the Idaho Supreme Court explained the characteristics of a fiduciary duty as
5 follows:

6 A fiduciary relationship imparts a position of peculiar confidence placed by one
7 individual in another. A fiduciary is a person with a duty to act primarily for the benefit
8 of another. A fiduciary is in a position to have and exercise, and does have and exercise
9 influence over another. A fiduciary relationship implies a condition of superiority of
10 one of the parties over the other. Generally, in a fiduciary relationship, the property,
11 interest or authority of the other is placed in the charge of the fiduciary.... (italics and
12 emphasis omitted).

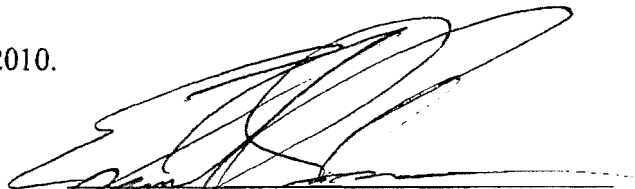
13 In *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) the Court found the
14 existence of a confidential relationship between the builder of a home and the purchaser where
15 the defects in the house were hidden and not discoverable by inspection. A similar result was
16 reached in *G&M Farms v. Funk Irrigation Company*, 119 Idaho 514, 808 P.2d 851 (1991)
17 where the manufacturer of an irrigation system was under a duty to disclose design defects that
18 were not discoverable by the purchaser. Here, however, there were no latent or hidden defects.
19 The fact that the public easement provided access to adjoining properties was obvious and in
20 plain sight. The recorded plat, to which the Plaintiff had constructive knowledge, gave notice
21 of the easement running along the east property line. While a confidential relationship may be
22 imposed upon a seller of real property when the seller is aware of defects that are not
23 discoverable by a purchaser, this is not such a case. There is no duty to disclose that which is
24 discoverable or in plain view. See, e.g., *Van Camp v. Bradford*, 623 N.E. 2d 731 (Ohio 1993);
25 *Klott v. Associates Real Estate*, 322 N.E. 2d 690 (1974). As such, as in *Sowards*, the Plaintiff
26 has failed to establish:
27
28

1. the existence of any confidential or fiduciary relationship between the Plaintiff and the Merceas;
2. that the Merceas made any partial or ambiguous statement which, not elaborated upon, would have been misleading;
3. that the Merceas obtained any information subsequently which would have made any previous representation untrue or misleading;
4. that the Merceas, or anyone on their behalf, made a false representation and that the Merceas knew that the Plaintiff would rely on that representation; and
5. that the Merceas knew that the Plaintiff was about to enter into the transaction under a mistake of fact.

The Merceas made absolutely no representation to the Plaintiff of any nature as to the location of the driveway upon the subject property and the location of the public easement that connects the driveway to the public street. The Plaintiff inspected the property prior to her purchase. Regrettably, the Plaintiff made a mistaken assumption as to the nature and the extent of the driveway and the public easement to which the Merceas had no knowledge.

As a matter of law, no duty of disclosure existed, and it is appropriate for this Court to enter summary judgement dismissing all of the Plaintiff's claims, including her claim based upon constructive fraud.

DATED this 30th day of April, 2010.



Edward J. Anson
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Blvd, Suite 300
Coeur d'Alene, Idaho 83814
Attorneys for Defendants Mercea

CERTIFICATE OF SERVICE

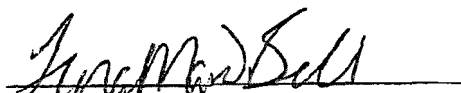
I certify that on this the 30th day of April, 2010, I caused a true and correct copy of the DEFENDANTS MERCEA'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Via Fax: (208) 664-2240

Joe and Sue Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814
Pro Se

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile:


Tina Marie Bell

STATE OF IDAHO } ss
COUNTY OF KOOTENAI
FILED

2010 MAY -5 PM 4:36

CLERK DISTRICT COURT

Indigo Q. Glavins
DEPT. 1

Edward J. Anson, ISB No. 2074
WITHERSPOON KELLEY
Attorneys & Counselors
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Telephone: (208) 667-4000
Facsimile: (208) 667-8470

*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M. LAMPHIEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

NO. CV-09-992

MERCEA'S MEMORANDUM IN
OPPOSITION TO LAMPHIEAR'S
MOTION FOR SUMMARY
JUDGMENT

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife,

Crossdefendants.

1 The Defendants Mercea submits this Memorandum in Opposition to Lamphiears's
2 Motion for Summary Judgment seeking dismissal of the Mercea's Crossclaim.

3 This Court previously granted the Plaintiff leave to file an Amended Complaint, which
4 the Plaintiff subsequently so filed. The Merceas have now filed their Answer to the Amended
5 Complaint, which includes a new crossclaim against Lamphiears. The Amended Complaint
6 and the Mercea's Answer to Amended Complaint supersedes the original Complaint and
7 Answer. I.R.C.P. 15(a). Thus, the Lamphiears are seeking dismissal of a crossclaim that no
8 longer exists and has been superseded by the crossclaim contained in the Mercea's Answer to
9 Amended Complaint.
10

11 In addition, Lamphiear has filed a Reply in Support of their Motion for Summary
12 Judgment alleging that as Merceas did not respond to the Lamphiear Motion for Summary
13 Judgment within twenty-one days it should therefore be granted. In support of that proposition
14 the Lamphiears cite Civil Rule 7.1. That cited rule is not a rule of procedure for the Courts of
15 the State of Idaho, but rather is a local rule of procedure for the United States District Court for
16 the District of Idaho, which has no force or effect upon this Court. The relevant rule is I.R.C.P.
17 56(c) which allows the filing of an answering brief fourteen days prior to the date of the
18 hearing. Thus, this Memorandum is timely filed.
19

20 The Plaintiff originally commenced this action against Mercea, Lamphiear, and a title
21 insurance company alleging numerous and various causes of action. Mercea moved for
22 summary judgment and received partial summary judgment dismissing all causes of action
23 against them except for constructive fraud. Mercea has now moved this Court to reconsider its
24 ruling on constructive fraud with a hearing set for May 25, 2010. In their Motion for
25 Reconsideration Mercea is arguing that as a matter of law no duty existed that required Mercea
26
27
28

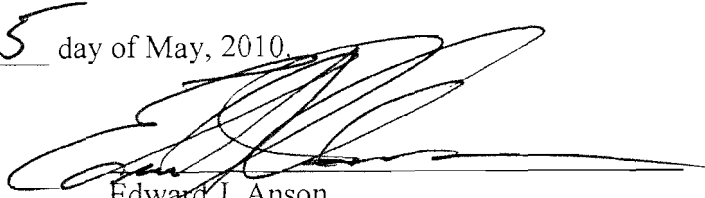
1 to disclose to the Plaintiff that what appeared to her to be a private driveway leading to the
2 subject residence was in fact predominately a public right-of-way that led to a shorter private
3 driveway which in turn led to the residence.
4

5 Lamphiear's Motion for Summary Judgment in essence is making the same argument
6 against the Mercea crossclaim (either the original or as contained in the Answer to Amended
7 Complaint) as the Merceas are making against the currently remaining constructive fraud cause
8 of action of Plaintiff as against them. If the Merceas are successful in having all causes of
9 action dismissed against them, then as a matter of law the Mercea's crossclaim against
10 Lamphiear should likewise be dismissed. However, if the Court does not dismiss the
11 constructive fraud claim against the Merceas, the Mercea's constructive fraud claim against
12 Lamphiear should likewise not be dismissed because the facts supporting each claim are
13 identical with one exception that is in favor of Mercea. The Merceas were merely the seller of
14 real property to the Plaintiff. The Lamphiears, however, were not only the seller of the same
15 real property to the Merceas, but also acted as the builder of the improvements upon the real
16 property which included the construction of the single family residence and the paving of the
17 public right-of-way in a manner that made it appear that the public right-of-way was a private
18 driveway. As the builder of the improvements, Lamphiear may have been under a greater duty
19 to Mercea than Mercea to Plaintiff.
20
21
22

23 In a technical sense, the Lamphiear Motion for Summary Judgment is not properly
24 before this Court as it is to a crossclaim that no longer exists but has been superseded.
25 Disregarding that technicality, if the substance of the Lamphiear motion is to be considered by
26 this Court, in the interest of judicial economy and in the interest of avoiding conflicting rulings
27 on the same issue, the Lamphiear motion should be considered simultaneously with the Mercea
28

1 Motion for Reconsideration on May 25, 2010, and not be heard some five days sooner on May
2 20, 2010.

3 Respectfully submitted this 5 day of May, 2010.

4
5
6 

7 Edward J. Anson
8 WITHERSPOON KELLEY
9 The Spokesman Review Building
10 608 Northwest Blvd., Suite 300
11 Coeur d'Alene, Idaho 83814-2146

12 *Attorneys for the Defendants Mercea*

13 CERTIFICATE OF SERVICE

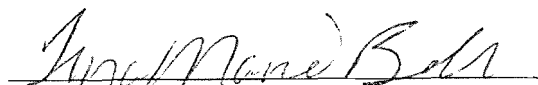
14 I certify that on this the 5th day of May, 2010, I caused a true and correct copy of
15 Answer to Amended Complaint and Crossclaim of Defendants Mercea to be forwarded, with all
16 required charges prepaid, by the method(s) indicated below, to the following person(s):

17 John P. Whelan, P.C.
18 Attorney at Law
19 213 N. 4th Street
20 Coeur d'Alene, Idaho 83814
21 *Counsel for Plaintiff*

☒ U.S. Mail
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22 Joe and Sue Lamphiear
23 1021 Crestline Drive
24 Coeur d'Alene, Idaho 83814
25 *Pro Se*

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile:

26 
27 TinaMarie Bell
28

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

2010 JUL -5 PM 4:36

CLERK DISTRICT COURT

Judge A. Harney
(OFFICIAL SIGNATURE)

Edward J. Anson, ISB No. 2074
WITHERSPOON KELLEY
Attorneys & Counselors
The Spokesman Review Building
608 Northwest Blvd., Suite 300
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Telephone: (208) 667-4000
Facsimile: (208) 667-8470

*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M. LAMPHIEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

ANSWER TO AMENDED
COMPLAINT AND CROSSCLAIM OF
DEFENDANTS MERCEA

COMES NOW the above named Defendants CORNELIUS MERCEA and PATRICIA MERCEA (hereinafter "Mercea"), by and through their attorney of record Edward J. Anson of Witherspoon Kelley, and in answer to the Amended Complaint and as a Crossclaim against Defendants JOE A. LAMPHEAR and SUSAN M. LAMPHEAR, admits, denies, and alleges as follows. The answer to the Plaintiff's Amended Complaint utilizes the paragraph numbering of the Amended Complaint, thus the answer to paragraph 1 of the Complaint is numbered 1 and does not recite that it is an answer to paragraph 1 of the Amended Complaint.

ANSWER

1. Mercea admits that the Plaintiff is an individual but lacks information sufficient to form a belief as to the remaining allegations contained in said paragraph and therefore denies the remaining allegations.

2. Admit.

3. Admit.

4. Admit.

5. Admit.

6. Admit.

7. Mercea admits the allegations contained in this paragraph with the exception that Mercea denies that all interested parties met at the home.

8. Mercea lacks information sufficient to form a belief as to the allegations contained in the first sentence of the paragraph, and therefore denies the same. Mercea admits the remaining allegations contained in said paragraph.

9. Mercea lacks information sufficient to form a belief as to the allegation that Plaintiff reviewed and relied upon the content of the disclosure statement in making her decision

1 to go forward with the purchase of the home and therefore denies the same. Mercea admits the
2 remaining allegations contained in said paragraph.

3 10. Mercea admits that the disclosure form correctly recited that there were no
4 conditions that may affect the ability of Defendants Mercea to provide clear title to their home.
5 Mercea denies each and every remaining allegation contained in said paragraph.
6

7 11. Mercea admits the first two sentences of this paragraph and lacks information
8 sufficient to form a belief as to the remaining allegations contained in this paragraph and
9 therefore denies the same.
10

11 12. Mercea denies the allegations set forth in this paragraph either generally or on the
12 basis that they lack information sufficient to form a belief as to those allegations and they are
13 therefore denied with the exception of the following facts which Mercea admits. The driveway
14 to the subject property runs a short distance from the front of the house and garage to where it
15 intersects a public easement. The public easement runs from Crestline Drive to an undeveloped
16 lot that at one time was owned by Defendants Lamphiear. Mercea lacks information sufficient
17 to form a belief as to the current owner of that large undeveloped lot. Mercea admits that the
18 subject property does not extend across the public easement and that property located to the east
19 of the public easement is part of a different parcel. Mercea affirmatively alleges that the public
20 easement provides access to both the subject property, the large undeveloped lot, the property
21 located to the east of the easement, and Lot 3, Block 1, of the Cherry Heights Subdivision lying
22 to the northwest of the subject property.
23
24

25 13. Mercea denies the allegations contained in this paragraph either as a general
26 denial or on a basis that they lack information sufficient to form a belief as to such allegations
27 with the exception that Mercea admits that Lamphiear in fact sold the subject property to Mercea
28

1 and supplied Mercea with a Warranty Deed. Mercea further admits that they sold the subject
2 property to Plaintiff.

3 14. Except as otherwise admitted in this paragraph, Mercea denies each and every
4 allegation contained in this paragraph. Mercea admits that they did not disclose to the Plaintiff
5 that the driveway on the subject premises ran to a public easement which in turn runs to
6 Crestline Drive. Mercea further admits that they did not disclose to the Plaintiff that the
7 property located across the public easement from the subject property was not a portion of the
8 subject property.
9

10 15. Deny. Mercea knew that the "open space" as described by Plaintiff was not a
11 portion of the subject property but Mercea actually thought it was part of the public easement.
12 Further, Mercea did not know that the owners of the parcel of real property located across from
13 the public easement used either the "open space" or the fenced area beyond the "open space" to
14 park automobiles. Mercea knew that such owner utilized the gated and fenced area for storage,
15 including the storage of a utility trailer.
16

17 16. Deny.

18 17. Deny.

19 18. Deny.

20 19. The Plaintiff has furnished to counsel for Mercea a copy of the overhead
21 photograph furnished to Plaintiff by First American Title indicating an overlay depicting the
22 general location of the lot lines of the subject real property. Mercea admits that it appears that
23 the east boundary line of the subject real property is erroneously depicted as being
24 approximately 15 feet further east than its accurate location. Mercea denies each and every
25 remaining allegation contained in said paragraph.
26
27
28

1 20. Deny.

2 21. Mercea admits that the Purchase and Sale Agreement between the Plaintiff and
3 Mercea provides for an award for attorneys' fees to the prevailing party in any litigation in any
4 way connected with the Purchase and Sale Agreement. Mercea denies each and every remaining
5 allegation contained in said paragraph.
6

7 **FIRST AFFIRMATIVE DEFENSE**

8 **I.**

9 The subject real property is Lot 2, Block 1, Cherry Heights according to the Plat
10 recorded in the office of the county recorder in Book "E" of Plats Page 9, records of Kootenai
11 County, Idaho. The Plat was filed and recorded on October 20, 1964. A true and correct copy
12 of the Plat is attached hereto as Exhibit "I" and by this reference incorporated herein.
13

14 **II.**

15 The Plat clearly depicts the public easement lying to the east of the subject property.

16 **III.**

17 The Plat further contains a metes and bounds description of Lot 2 as follows:

18 beginning at the section Corner at the junction of 15th Street and
19 Harrison Avenue; thence Easterly along the section line between
20 sections 7 and 18, T.50N., R.3W. B.M. a distance of 814.0 feet,
21 more or less, to a concrete monument on the east side of U.S.
22 Highway No. 10; thence S. 33°-50'E. along the east side of U.S.
23 Highway No. 10, 673.6 feet to the Northwest Corner of Lot 2 and
24 the Point of Beginning; thence N. 56°-10'E., 120.0 feet; thence S.
25 33°-50'E, 36.02 feet; thence S. 0°-44'E., 76.37 feet; thence S. 56°-
26 10'W., 78.3 feet; thence N. 33°-50'W, 100.0 feet to Point of
27 Beginning located in Coeur d'Alene, Kootenai County, Idaho.
28

IV.

 Plaintiff purchased and obtained Lot 2 with the boundaries as described above.

1 V.

2 The parcel of real property purchased by Plaintiff contains a driveway which connects the
3 subject property to the public easement which in turn connects to Crestline Drive.
4

5 VI.

6 There are no conditions that effect clear title to the subject property.

7 **SECOND AFFIRMATIVE DEFENSE**

8 VII.

9 At the time that Plaintiff entered into the Purchase and Sale Agreement the boundary
10 lines of the subject were clearly marked and the fact that the public easement was used to
11 provide access to Lot 3 and the portion of the lot located across the public easement from the
12 subject property were clearly evident, in addition to providing access to the subject property.
13 Plaintiff inspected the subject property prior to executing the Purchase and Sale Agreement.
14

15 VIII.

16 Attached hereto cumulatively as Exhibit "2" are true and correct copies of photographs
17 taken by Edward J. Anson in the presence of counsel for Plaintiff on April 14, 2009 of the
18 subject real property, the public easement, and surrounding properties. Except for a pavement
19 marking and a white stake depicted in photographs 10 and 11 described below, all items
20 depicted in the photographs were present at the time when Plaintiff inspected the subject
21 property prior to entering into the Purchase and Sale Agreement. A brief description of these
22 photographs is as follows:

23 Photograph # 1 A view of the public easement depicting the
24 residence on the subject property. The public
25 easement is a paved roadway extending from
26 Crestline Drive. Depicted is a gravel driveway
cutting from the easement to serve
improvements located on the northeasterly
adjoining Lot 3.

27 Photograph # 2 A view depicting the driveway servicing Lot 3
28 from the public easement.

- 1 Photograph # 3 A photograph depicting the residence on the
2 subject property. The stake flagged with a pink
3 ribbon is the north corner of the subject
4 property.
- 5 Photograph # 4 A view depicting the public easement. To the
6 left of the public easement is that area identified
7 by the Plaintiff as the "open space" which is
8 adjacent to a fenced area used for storage and
9 owned by the parcel located on that side of the
10 public easement.
- 11 Photograph # 5 A photograph of the public easement with the
12 north corner of the subject property marked by a
13 stake with pink ribbons shown in the
14 foreground, and the southeast corner of the
15 property marked by a stake with pink ribbons
16 shown in the background. Superimposed by
17 counsel for Mercea in red, is the northeast and
18 east property line of the subject property. The
19 left portion of this photograph depicts the open
20 space and fenced and gated area owned by that
21 parcel located on that side of the public
22 easement.
- 23 Photograph # 6 A view depicting the gate, fence, two sheds, and
24 a motor vehicle parked across the public
25 easement from the subject property.
- 26 Photograph # 7 A view depicting where the driveway intersects
27 with the public easement. The ribbon stake in
28 the left foreground is the southeast property
corner. The stake marked with pink ribbons in
the background is the north corner of the subject
property.
- Photograph # 8 A second view of where the driveway intersects
with the public easement which also shows the
gated and fenced area across the public
easement from the subject property.
- Photograph # 9 A view of the gated and fenced area across the
public easement from the subject property.
- Photograph # 10 A view of the public easement with the subject
property's northeast corner marked on the

1 pavement. The white stake across from the
2 pavement marking is a corner of the property
3 located across the public easement from the
4 subject property. The pavement marking and
5 the white stake were the only stakes and
6 markings not present at the time that Plaintiff
7 purchased the property.

8
9 Photograph # 11 A second view of the marked property corner
10 marked in paint on the pavement of the public
11 easement together with a corner of the parcel
12 located across from the public easement.

13 Photograph # 12 A view looking northerly depicting a stake
14 marked with pink ribbon being the north
15 property corner. This photograph also depicts
16 the driveway connecting the carport on the
17 northwesterly adjoining Lot 3 to the public
18 easement.

19 IX.

20 On the basis of the foregoing, the Plaintiff is barred and precluded from asserting any
21 claim against Mercea based upon a failure to disclose any facts in either the real property
22 disclosure form or otherwise.

23 FIRST GENERAL DEFENSE

24 X.

25 On the basis of the affirmative defenses set forth above, the Plaintiff's Complaint as
26 against Mercea fails to state a claim upon which relief can be granted.

27 CROSSCLAIM AGAINST DEFENDANTS LAMPHEAR

28 XI.

Cornelius Mercea and Patricia Mercea are husband and wife and reside in Tucson,
Arizona.

1 **XII.**

2 Joe A. Lamphiear and Susan M. Lamphiear ("Lamphiear") are husband and wife and
3 reside in Kootenai County, Idaho. All the acts of each of the Lamphiears were in the furtherance
4 of the marital community and either expressly or impliedly authorized and/or ratified by the
5 other.
6

7 **XIII.**

8 This action concerns real property (the "subject real property") with a common address
9 of 1111 Crestline Drive, Coeur d'Alene, Idaho and is more particularly described as follows:
10

11 **Lot 2, Block 1, CHERRY HEIGHTS, according to the plat recorded in the**
12 **office of the County Recorder in Book "E" of Plats at Page 9, records of**
13 **Kootenai County, ID.**

14 **XIV.**

15 The Plaintiff originally commenced this action against Mercea, Lamphiear, and a title
16 insurance company alleging numerous and various causes of action. Mercea moved for
17 summary judgment and received partial summary judgment dismissing all causes of action
18 against them except for constructive fraud. Mercea has now moved the Court to reconsider its
19 ruling on constructive fraud. While Mercea believes that the constructive fraud cause of action
20 should likewise be dismissed, if it is not, in the alternative Mercea alleges hereunder that
21 Lamphiear has committed constructive fraud against them.

22 **XV.**

23 Lamphiear purchased the subject real property during 2004.

24 **XVI.**

25 That at the time Lamphiear purchased the subject real property the property was an
26 unimproved lot.

27 **XVII.**

28 That between 2004 and 2006 Lamphiear, as general contractor, constructed a single
family residence upon the subject real property.

1 XVIII.

2 That access to the subject real property is by a public right-of-way running along the east
3 boundary of the property.

4 XIX.

5 That the public right-of-way provides access to four separate lots, being Lots 1, 2, and 3
6 of Block 1, Cherry Heights and Lot 1, Block 2, Cherry Heights 1st Addition.

7 XX.

8 As a condition of obtaining City of Coeur d'Alene approval for the construction of the
9 single family residence upon the subject real property, Lamphiear was required to, and did, pave
10 the public right-of-way.

11 XXI.

12 On or about March 13, 2006 Lamphiear sold the subject real property to Mercea at a sale
13 price of \$395,000.00.

14 XXII.

15 Lamphiear constructed the single family residence and paved the public right-of-way in a
16 manner that made it appear that the public right-of-way was the private driveway to the single
17 family residence running from Crestline Drive to the residence.

18 XXIII.

19 That as the builder of the improvements upon the subject real property, and as the seller
20 of the subject real property to Mercea, Lamphiear was under a fiduciary duty or confidential
21 relationship with Mercea.

22 XXIV.

23 That Lamphiear breached their duties owing to Mercea by their failure to disclose to
24 Mercea that the private driveway to the subject real property did not extend from the residence
25 to Crestline Drive, but instead merely extended only a very short distance from the residence to
26 the public right-of-way.

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XXV.

That Mercea purchased the subject real property from Lamphiear without knowledge that the private driveway did not extend to Crestline Drive.

XXVI.

That on the basis of the foregoing, Lamphiear has committed constructive fraud against Mercea, and as a direct and proximate result of this constructive fraud Lamphiear has caused Mercea damages in an amount to be established at the trial of this matter, but which exceed \$10,000.00 or in the alternative, Mercea seeks to rescind their purchase of the subject real property from Lamphiear and seeks restitution of the sum of \$395,000.00 together with consequential damages.

WHEREFORE, MERCEA AS DEFENDANTS AND CROSSCLAIMANTS PRAY FOR A JUDGMENT AND DECREE AS FOLLOWS:

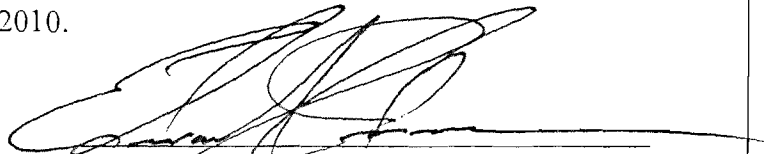
1. An order dismissing Plaintiff's claims against Mercea with prejudice and adjudicating that she take nothing thereby;

2. A judgment in favor of Mercea against Plaintiff for Mercea's reasonable attorneys' fees and costs pursuant to the terms of the Purchase and Sale Agreement entered into between the parties.

3. For damages against Lamphiear in an amount to be determined at trial but in excess of the sum of \$10,000.00, or alternatively, rescission of the purchase agreement between Mercea and Lamphiear and restitution of the sum of \$395,000.00 together with consequential damages.

4. For such other and further relief as this Court deems just and equitable.

DATED this 5 day of May, 2010.



Edward J. Anson
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Attorneys for the Defendants Mercea

CERTIFICATE OF SERVICE

I certify that on this the 5th day of May, 2010, I caused a true and correct copy of Answer to Amended Complaint and Crossclaim of Defendants Mercea to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
Counsel for Plaintiff

- ☒ U.S. Mail
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Joe and Sue Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814
Pro Se

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TinaMarie Bell

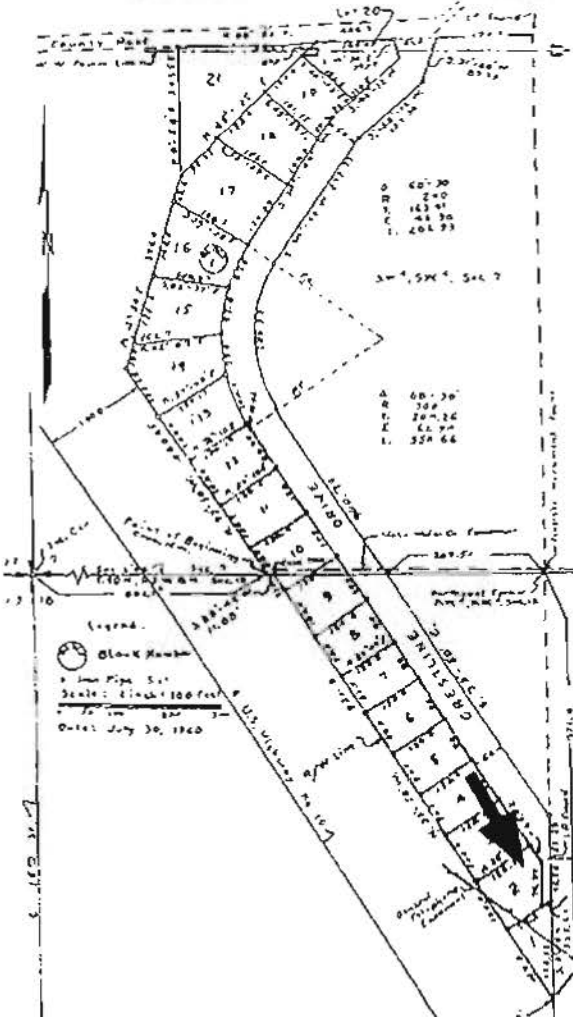
EXHIBIT 1

EXHIBIT 1

EXHIBIT 1

EXHIBIT 1

CHERRY HEIGHTS



THIS SKETCH IS FURNISHED WITHOUT CHARGE SOLELY FOR THE PURPOSE OF ASSISTING IN LOCATING SAID PREMISES, AND THE FIRST AMERICAN TITLE COMPANY ASSUMES NO LIABILITY FOR INACCURACIES THEREIN.

OWNERS CERTIFICATES

BE IT KNOWN that the undersigned, the owners of the land described in the foregoing certificates, do hereby certify that the same are true and correct copies of the original records on file in the office of the County Clerk of the County of Adams, Idaho.

Lot 2
Contract Purchase, and Mary Morgan, husband and wife, the owners of the land described in the foregoing certificate, do hereby certify that the same are true and correct copies of the original records on file in the office of the County Clerk of the County of Adams, Idaho.

Lot 4
Contract Purchase, and Mary Morgan, husband and wife, the owners of the land described in the foregoing certificate, do hereby certify that the same are true and correct copies of the original records on file in the office of the County Clerk of the County of Adams, Idaho.

Lot 6
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Lot 16
Contract Purchase, and Mary Morgan, husband and wife, the owners of the land described in the foregoing certificate, do hereby certify that the same are true and correct copies of the original records on file in the office of the County Clerk of the County of Adams, Idaho.

STATE OF IDAHO 53

County of Adams
On this 30th day of July, 1960, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared the following persons, to-wit: Mary Morgan, and Mary Morgan, husband and wife, who are known to me to be the owners of the land described in the foregoing certificates, and they acknowledged to me that they executed the same for the purposes and consideration therein expressed.

SURVEYOR'S CERTIFICATE

I, Mark F. Johnson, Surveyor, do hereby certify that the foregoing is a true and correct copy of the original records on file in the office of the County Clerk of the County of Adams, Idaho.

STATE OF IDAHO 53
County of Adams
On this 30th day of July, 1960, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared the following persons, to-wit: Mary Morgan, and Mary Morgan, husband and wife, who are known to me to be the owners of the land described in the foregoing certificates, and they acknowledged to me that they executed the same for the purposes and consideration therein expressed.

COUNTY SURVEYOR'S CERTIFICATE
I, Mark F. Johnson, Surveyor, do hereby certify that the foregoing is a true and correct copy of the original records on file in the office of the County Clerk of the County of Adams, Idaho.

CITY COUNCIL APPROVAL
This plan was approved by the City Council of the County of Adams, Idaho, on this 30th day of July, 1960.

COUNTY COMMISSIONERS APPROVAL
This plan was approved by the County Commissioners of the County of Adams, Idaho, on this 30th day of July, 1960.

COUNTY TREASURER
This plan was approved by the County Treasurer of the County of Adams, Idaho, on this 30th day of July, 1960.

COUNTY HEALTH OFFICER
This plan was approved by the County Health Officer of the County of Adams, Idaho, on this 30th day of July, 1960.

COUNTY RECORDER
This plan was approved by the County Recorder of the County of Adams, Idaho, on this 30th day of July, 1960.

STATE OF IDAHO 53
County of Adams
On this 30th day of July, 1960, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared the following persons, to-wit: Mary Morgan, and Mary Morgan, husband and wife, who are known to me to be the owners of the land described in the foregoing certificates, and they acknowledged to me that they executed the same for the purposes and consideration therein expressed.

STATE OF IDAHO 53
County of Adams
On this 30th day of July, 1960, before me, the undersigned, a Notary Public in and for the State of Idaho, personally appeared the following persons, to-wit: Mary Morgan, and Mary Morgan, husband and wife, who are known to me to be the owners of the land described in the foregoing certificates, and they acknowledged to me that they executed the same for the purposes and consideration therein expressed.

EXHIBIT 2

EXHIBIT 2

EXHIBIT 2

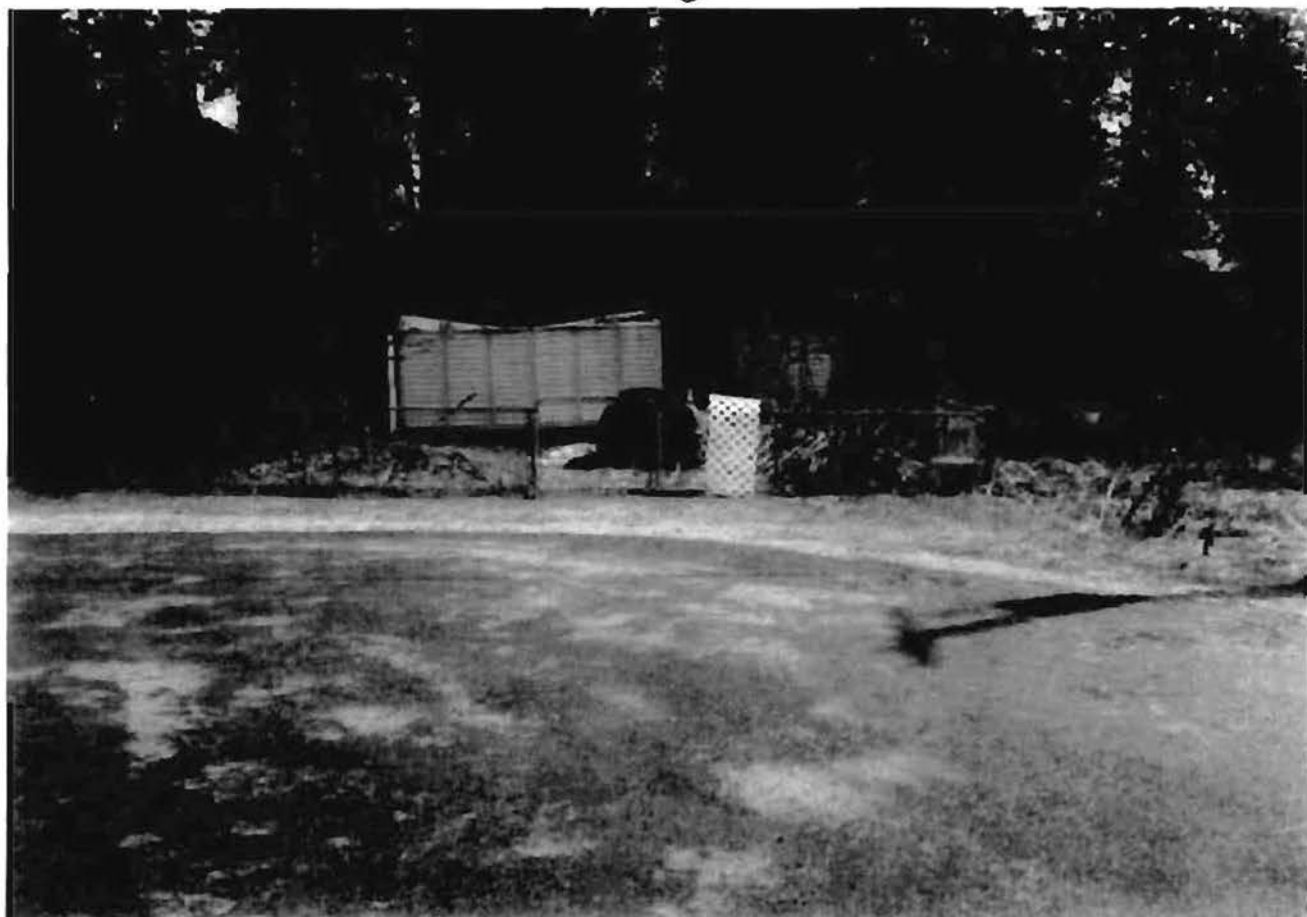
EXHIBIT 2







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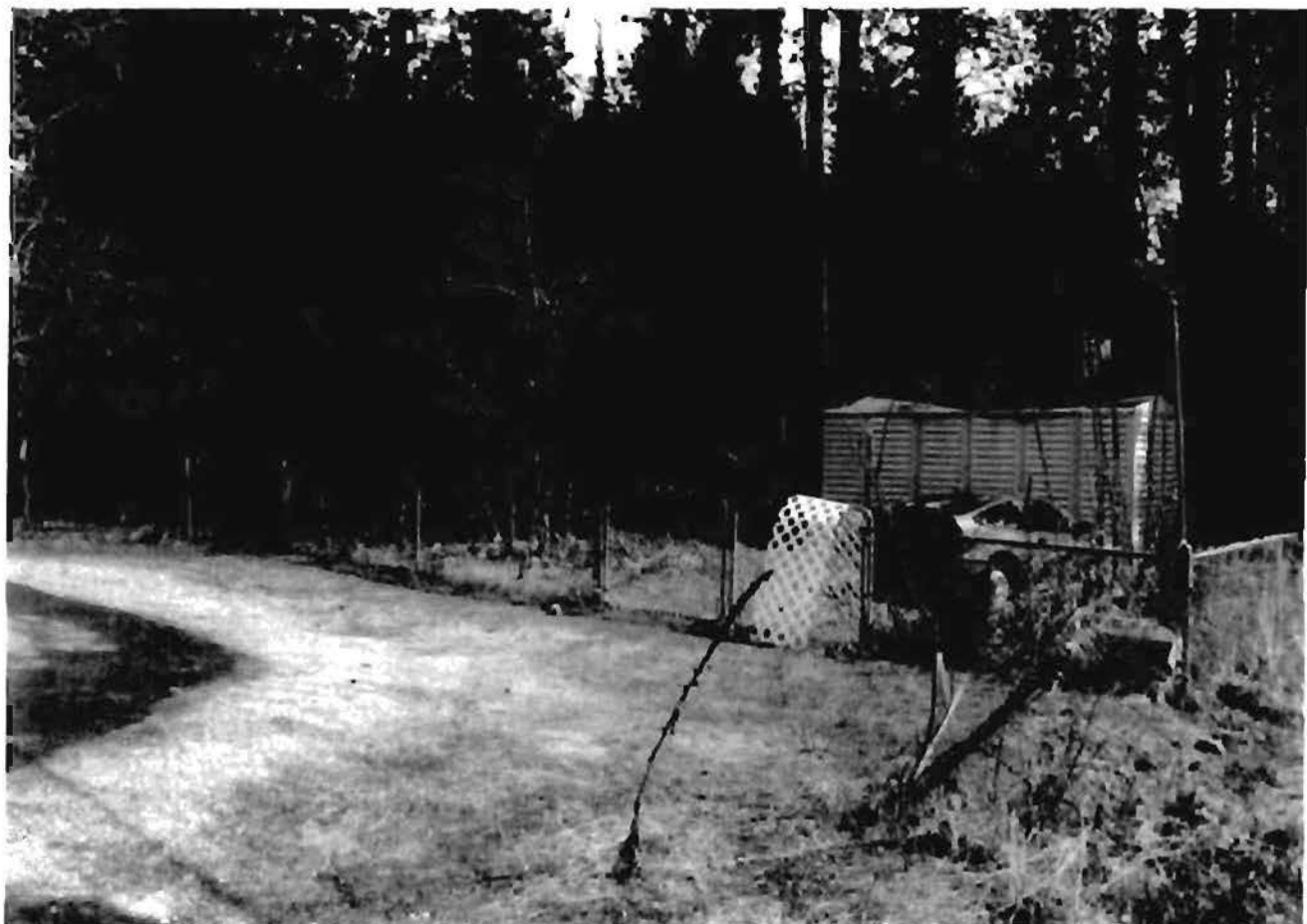


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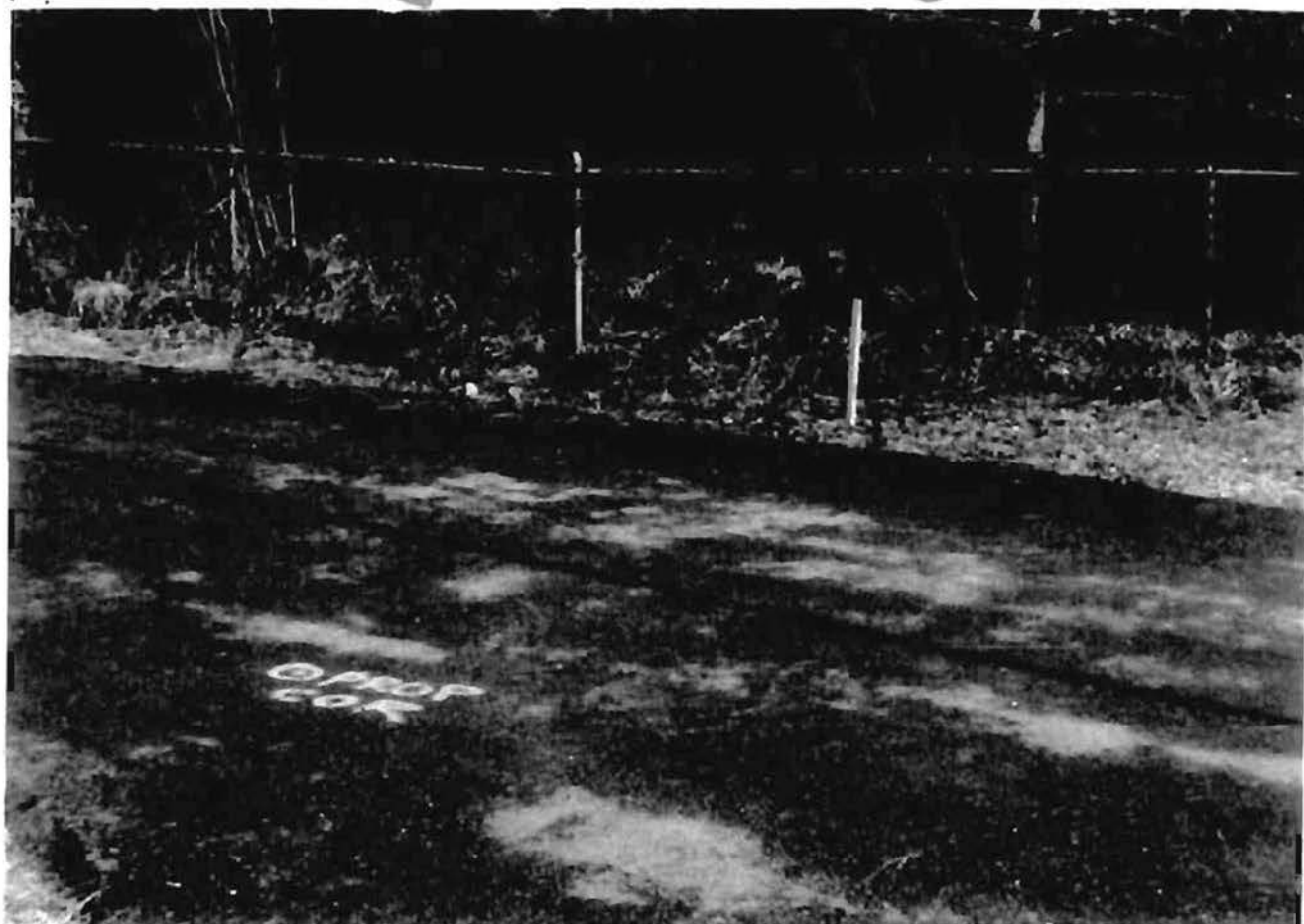


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STATE OF IDAHO
COUNTY OF KOOTENAI
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CLERK DISTRICT COURT
Susan Reed
DEPUTY

Joe and Susan Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN
AND FOR THE COUNTY OF KOOTENAI

Diana James,
Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A
LAMPHIEAR and SUSAN M LAMPHIEAR
husband and wife, FIRST AMERICAN TITLE
INSURANCE CO.

Defendants

Case No. CV-09-992

OBJECTION AND REPLY TO AMENDED
CROSSCLAIM BY DEFENDANTS MERCEA
CROSSCLAIM ON CROSSCLAIMANTS
MERCEAS

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife

Crossclaimants,

vs.

JOE A LAMPHIEAR and SUSAN M
LAMPHIEAR, husband and wife

Crossdefendants,

1

COMES NOW the above named Defendants Joe Lamphiear and Susan Lamphiear (Pro Se)
(Hereinafter "Lamphiears")

1 Crossclaim, Objection and Reply to Amended Crossclaim by Defendants Mercea

² Lamphiears HEREBY submit Counterclaim, Objection and Answer to Amended Crossclaim, by Defendants Cornelius Mercea and Patricia Mercea (Hereinafter "Mercea").

OBJECTION AND REPLY TO AMENDED CROSSCALIM

Lamphiears object to Defendant Merceas using the Lamphiears as a pawn in the Amended Crossclaim in this action.

In March of 2006 Merceas purchased Lot 2, Block 1, Cherry Heights, according to the plat recorded in the office of the County Recorder in book "E" of Plats at page 9, records of Kootenai County, ID. With a common address of 1111 Crestline Drive, Coeur d Alene Idaho 83814, and received clear title on March 6, 2006.

Merceas lived/occupied the above described property for a period of two years until which time they sold the above described property to Plaintiff in March of 2008 and Plaintiff was transfer clear title.

During the two years Merceas lived/occupied the above describe property, Merceas had never expressed to Lamphiears a problem with the Home, Driveway, or Public Right-of-Way, it is only now four years and 2 months later, (two years which Plaintiff has owner/occupied the above described property), Merceas are now claiming Lamphiears breached a duty owed to Merceas, claiming non-discloser of Public right-of-way, the same claim, Plaintiff has imposed on Merceas.

Merceas now claims they purchased the subject real property from Lamphiears without knowledge that the private driveway did not extend to Crestline Drive . Same claim Plaintiff has imposed on Merceas.

Merceas never expressed to Lamphiears that they had purchased the above described property without knowledge of the Public Right-of-Way or expressed any other concerns during the

² Crossclaim, Objection and Reply to Amended Crossclaim by Defendants Mercea

³ two (2) years they lived/occupied the above described property.

For Merceas to claim breach of duties, failure to disclose, constructive fraud upon Lamphiears four years (4) two months (2) later is lunacy.

On the basis of the forgoing, Merceas is barred and precluded from asserting any claim against Lamphiears based upon failure to disclose what is constructive knowledge of facts pertaining to a private driveway or Public Right-of-way of the above described property.

FIRST GENERAL DEFENSE

On the basis of the affirmative defenses set forth above, Merceas Crossclaim against Lamphiears fails to state a claim upon which relief can be granted.

CROSSCLAIM ON CROSSCLAIMANTS MERCEA

Merceas have committed breach of duties, failure to disclose, and constructive fraud on the Lamphiears by admitting in the Crossclaim they withheld facts of their purchase of above described property and not made known to Lamphiears for a period of four years (4) and two months (2):
Entered hereto as Crossclaim:

1. Merceas had knowledge of issues that were not made known to Lamphiear regarding Public Right-of-way and private driveway at the time they lived/occupied the above described property.
2. Merceas had knowledge that were not made known to Lamphiears that they purchased the home without knowledge that the private driveway did not extend to Crestline Drive.
3. Merceas withheld knowledge from Lamphiears of concerns regarding the Public Right-of-Way during a two years (2) period that they lived/occupied the above described property, and for a two year (2) and two month (2) period after they sold the property to Plaintiff with a total of four years (4) and two months (2) the concerns where never made known to

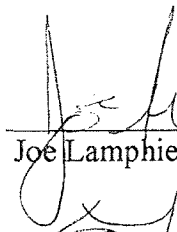
⁴ Lamphiears.

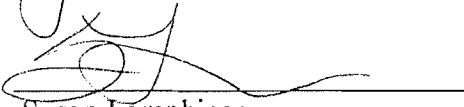
That on the basis of the foregoing, Merceas have committed constructive fraud against Lamphiears and as a direct and proximate result of the constructive fraud Merceas has caused Lamphiears damages in a amount to be established at trial/by Court of this matter, but which exceed \$10,000.00 together with consequential damages.

WHEREFORE, LAMPHIEARS AS DEFENDANTS ON CROSSCALIM PRAY FOR A JUDGMENT AND DECREE AS FOLLOWS;

1. An order dismissing Merceas Crossclaim against Lamphiears, and Lamphiears Crossclaim against Merceas with prejudice and adjudicating the Lamphiears and Merceas as they take nothing thereby;
2. An order squashing Amended Crossclaim by Merceas against Lamphiears, and Crossclaim by Lamphiears against Merceas thereby converting back to original Summary Judgment Hearing Scheduled for May 20th, 2010 at 3:00pm. TO BE HEARD BEFOR THE, *Honorable John P. Luster*.
3. For damages against Merceas in an amount to be determined at trail/by Court, but in excess of the sum of \$10,000.00 together with consequential damages.
4. For such other and further relief as this court deems just and equitable.

Dated this 10TH day of May, 2010



Joe Lamphiear


Susan Lamphiear

CERTIFICATE OF SERVICE

I certify that on this 10th day of May, 2010, I caused a true and correct copy of COUNTERCLAIM, OBJECTION AND ANSWER TO AMENDED CROSSCLAIM BY DEFENDANTS MERCEAS to be forwarded with all required charges prepaid, by method(s) indicated below, to the following person(s).

John P Whelan
213 N. 4th Street
Coeur d' Alene, Id. 83814


Attorney for Plaintiff

☐ U.S. Mail, Postage Paid
☒ Hand Delivered
☐ Overnight Mail
☐ E-Mail

Edward J Anson
Witherspoon, Kelly, Davenport & Toole, P.S.
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d' Alene Id. 83814-2146

Attorneys for defendants Mercea

☐ U.S. Mail, Postage Paid
☒ Hand Delivered
☐ Overnight Mail
☐ E-Mail
☐ Fax



Sue Lamphear

STATE OF IDAHO
COUNTY OF KOOTENAI
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CLERK DISTRICT COURT

Linda A. Haworth
RECEIVED

Edward J. Anson, ISB No. 2074
WITHERSPOON KELLEY
Attorneys & Counselors
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Telephone: (208) 667-4000
Facsimile: (208) 667-8470
Email: ej@witherspoonkelley.com

*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHEAR and SUSAN M. LAMPHEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

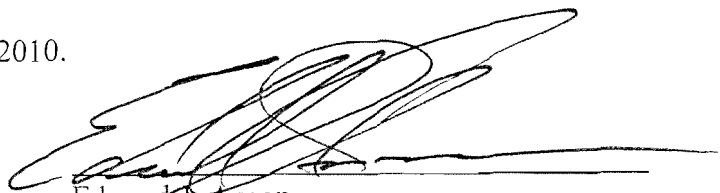
RESPONSE TO PLAINTIFF'S
MOTION FOR RECONSIDERATION



1 The Defendants Mercea submits the following in response to Plaintiff's Motion for
2 Reconsideration or to Amend the Order re Mercea's Motion for Summary Judgment.

3 The Plaintiff contends that the Order re Mercea's Motion for Summary Judgment does
4 not accurately reflect the Court's oral ruling on the motion for summary judgment. The
5 Merceas submit that it does. Attached hereto as Exhibit A is a true and correct copy of the
6 Reporter's Partial Transcript of Proceedings upon the Court's Ruling on Summary Judgment
7 made in open Court on February 4, 2010.
8

9 DATED this 14 day of May, 2010.



Edward J. Anson
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Attorneys for the Defendants Mercea

17 CERTIFICATE OF SERVICE

18 I certify that on this the 14 day of May, 2010, I caused a true and correct copy of
19 RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION to be forwarded, with
20 all required charges prepaid, by the method(s) indicated below, to the following person(s):

21 John P. Whelan, P.C.
22 Attorney at Law
23 213 N. 4th Street
24 Coeur d'Alene, Idaho 83814
Counsel for Plaintiff

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile: (208) 664-2240

25 Joe and Sue Lamphiear
26 1021 Crestline Drive
27 Coeur d'Alene, Idaho 83814
Pro Se

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile:

28 
Tina Marie Bell

EXHIBIT A

IN THE DISTRICT COURT OF THE FIRST
JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF KOOTENAI

BEFORE THE HONORABLE JOHN P. LUSTER, DISTRICT JUDGE

DIANA JAMES,

PLAINTIFF,

VS.

NO. CV-09-992

CORNELIUS MERCEA AND PATRICIA
MERCEA, HUSBAND AND WIFE, JOE
A. LAMPHIEAR AND SUSAN M.
LAMPHIEAR, HUSBAND AND WIFE,
FIRST AMERICAN TITLE INSURANCE
CO.

DEFENDANTS.

COPY

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

COURT'S RULING ON SUMMARY JUDGMENT

THURSDAY, FEBRUARY 4, 2010

1 APPEARANCES OF COUNSEL:

2 FOR THE PLAINTIFF: JOHN P. WHELAN
3 ATTORNEY AT LAW
4 213 NORTH 4TH STREET
5 COEUR D'ALENE, IDAHO 83814

6 FOR THE DEFENDANTS: EDWARD J. ANSON
7 MERCEAS WITHERSPOON KELLEY
8 608 NORTHWEST BOULEVARD
9 SUITE 300
10 COEUR D'ALENE, IDAHO 83814

11 FOR THE DEFENDANTS: JOE & SUSAN LAMPHIEAR
12 LAMPHIEARS 1021 CRESTLINE DRIVE
13 COEUR D'ALENE, IDAHO 83814

14 FOR THE DEFENDANT: JOHN K. OLSON
15 FIRST AMERICAN TITLE HAWLEY TROXELL ENNIS & HAWLEY LLC
16 877 MAIN STREET
17 SUITE 1000
18 P.O. BOX 1617
19 BOISE, IDAHO 83701
20
21
22
23
24
25

1 COEUR D'ALENE, IDAHO, THURSDAY, FEBRUARY 4, 2010

2 5:02 P.M.

3 * * *

4 THE COURT: In any rate, I've had a chance
5 to go over notes of some of the arguments that
6 have been presented here today, and I think the
7 Court's prepared to make an oral pronouncement
8 here in terms of the Motion for Summary Judgment.
9 And I apologize in advance; I don't know that I
10 will be as articulate as counsel has been in
11 arguing their case in terms of entering my ruling
12 here today.

13 I don't know that I'm going to go over the
14 facts at any great length, because I think the
15 facts are largely undisputed with a certain
16 limited exception in terms of the real estate
17 transaction and what was actually conveyed by the
18 Merceas to Ms. James and the descriptions that
19 were included in the plat and in the real estate
20 transactional documents, the actual makeup
21 description of the property, and the public
22 right-of-way that runs through or up to the
23 subject property adjacent to the private driveway.
24 There's really no dispute as to the designation
25 and the lay-out of that. In fact, the defendant's

1 exhibits were used by the plaintiffs here to make
2 their argument and their description to the Court.

3 Essentially, Ms. James purchased a parcel
4 of real property on Crestline Drive from the
5 Merceas in the Cherry Heights subdivision. This
6 was Lot 2. It was a single-family residence.
7 Access is provided by a driveway located on the
8 property. That driveway, however, is intersected
9 with a public easement that is connected to
10 Crestline Drive.

11 During this sales transaction, one factual
12 note is is that neither of the Merceas have ever
13 met with Ms. James nor have they spoken personally
14 with her by telephone or had any direct
15 correspondence. There is no real evidence that
16 there was any specific representation about the
17 public right-of-way in question here to Ms. James
18 from the Merceas nor is there anything in the
19 record that would indicate such a representation
20 was made by any agents of the Merceas.

21 It's also clear that the plaintiff,
22 Ms. James, had inspected the property prior to
23 offering to purchase it, and when she did view the
24 home prior to making her offer, the home appeared
25 to have a driveway that ran from the public street

1 to the garage in the front area of the home. The
2 home did not have a front yard, per se, as the
3 paved asphalt driveway extended all the way to the
4 front door. The driveway stops at the eastern
5 property line of the home.

6 Now, Ms. James' position is is that a
7 reasonable person looking at this home would have
8 absolutely no reason to believe that the driveway
9 leading to the front door of the home is anything
10 but the driveway to the residence.

11 There was a property disclosure form that
12 was prepared in this case, and it listed that
13 there was no condition that might affect the
14 ability of the Merceas to convey clear title to
15 the property.

16 Again, it appears in the plaintiff's
17 complaint that she thought that the public
18 easement running along the eastern boundary of the
19 property was her private and exclusive driveway,
20 even though the easement was obviously being used
21 by three other properties. However, there is
22 again no factual dispute that the plaintiff
23 received precisely what the plat showed for her
24 property.

25 Now, those are just some facts that I'm

1 highlighting in addition to some of the other
2 facts that I think are of the record included in
3 the affidavits submitted by the parties.

4 We're here for purposes of summary
5 judgment and the standards for summary judgment,
6 again, have been well set out by counsel and are
7 found, of course, under Rule 56. But,
8 essentially, the purpose of summary judgment is
9 that summary judgment can be granted where there
10 is no genuine issue and that the moving party is
11 entitled to judgment as a matter of law. In order
12 to make this determination, the Court must look to
13 the pleadings, the depositions and admissions on
14 file together with any affidavits.

15 In considering a Motion for Summary
16 Judgment, the Court is obligated to liberally
17 construe in favor of the party opposing the motion
18 where a jury has been requested, as in this case.
19 The party opposing the motion is to be given the
20 benefit of all favorable inferences which might be
21 reasonably drawn from the evidence.

22 If the record contains conflicting
23 inferences or if reasonable minds might reach
24 different conclusions, a summary judgment must be
25 denied.

1 Once the moving party has properly
2 supported the Motion for Summary Judgment, the
3 non-moving party must come forward with evidence
4 which contradicts the evidence submitted by the
5 moving party and which then would establish the
6 existence of a material issue of disputed facts.

7 Essentially, the purpose of summary
8 judgment is to eliminate the necessity of trial
9 where facts are not in dispute and where existent
10 and undisputed facts lead to a conclusion of law
11 which is certain.

12 And so it's with that foundation that the
13 Court will assess the claims that the plaintiff
14 has brought here against the defendant, Mercea,
15 and that, of course, is the limited nature of our
16 motion here today is the summary judgment that's
17 been brought by the defendants Mercea. We're not
18 dealing with the issues that involve either of the
19 other parties that are appearing here in front of
20 the Court today.

21 The pleadings are a little general, and
22 that certainly is allowed under Idaho law, so it's
23 somewhat difficult to ascertain precisely what all
24 the causes of action are that are before the
25 Court. However, I think counsel have done a

1 pretty good job of isolating what those causes of
2 action are and, accordingly, the Court can try to
3 address the causes that I think are in front of
4 the Court.

5 Now, I took a little time here with this
6 case, and I'll be quite frank that I'm very
7 troubled with this case because, personally, my
8 inclination is that summary judgment in this case
9 should be granted. I think that summary judgment
10 certainly should be and will be granted with
11 respect to most of the claims and causes of
12 actions that are asserted here, but I think that
13 the end conclusion of the Court is is that there
14 will be a remaining cause of action that should
15 proceed.

16 I'm a little conflicted here because I'm
17 certainly conversant with many of the recent
18 appellate court decisions which seem to reinforce
19 the preference for these cases proceeding on their
20 merits where there are some measure of arguable
21 facts and that the party opposing that motion is
22 entitled to the appropriate inference.

23 I think that, certainly the Merceas are
24 entitled to summary judgment on certain claims
25 that may or may not be advanced, but just to

1 clarify, the issues that, in my estimation, should
2 remain in this case.

3 This case is not a defective title case.
4 The evidence is fairly clear that clean and clear
5 title was conveyed by the Merceas to the
6 plaintiff, to Ms. James.

7 The real estate transaction included the
8 plat map, which clearly provided a description of
9 what was owned and what was transferred, and that
10 included the representation of the public
11 right-of-way that was clearly of record in this
12 transaction.

13 Ms. James has received a clear title to
14 her property, there is no defect in her title,
15 and, therefore, there is no claim for defective
16 title that should be advanced in this case, and as
17 a matter of law, that claim against the Merceas
18 should be dismissed for purposes of summary
19 judgment.

20 Now, that's not to say that Ms. James may
21 not have received something that she felt that she
22 bargained for and may be damaged as a consequence,
23 and that was the purpose of my question earlier,
24 Mr. Whelan. I think there is a difference between
25 defective title and perhaps the property not being

1 the value that the plaintiff perceived that it
2 would be, given what I'll discuss a little later
3 on. But certainly this is not a case where the
4 claim for defective title should proceed.

5 Furthermore, and, additionally, this is
6 not an encroachment case, and there is no evidence
7 that would allow this case to proceed on any claim
8 for an encroachment cause of action, and that
9 should be summarily dismissed as well.

10 The Property Disclosure Act provided under
11 Idaho law provides that the seller must submit an
12 accurate seller property disclosure form. Now, in
13 this case, the Merceas did not disclose the public
14 right-of-way. The form had a place where the
15 sellers would disclose the following:

16 It says, "Additional Remarks and/or
17 Explanation Section. Please list any other
18 existing problems that you know of concerning the
19 property including legal, physical, product,
20 defects, or others that are not already listed."

21 Now, the Merceas did not list anything
22 within that form of the property disclosure
23 document. But I don't think that in this case
24 there is a violation of Idaho Code 55-2501,
25 et seq, from the standpoint that the purpose of

1 the Act is to give the buyer of real estate notice
2 of the latent defects that one could not see from
3 the naked eye. In this case, the drive has a
4 public access way located outside the boundaries
5 of the property. A mistaken assumption does not
6 give rise to a cause of action for failure to
7 disclose under the Act.

8 There is nothing within the Act that would
9 indicate that the Merceas specifically had the
10 obligation to disclose the public right-of-way.
11 The Act does require that they include information
12 not limited to the source of water supply, nature
13 of sewer systems, et cetera. However, the Act
14 does not specifically require that the public
15 right-of-way had to be disclosed.

16 Summary judgment should be granted with
17 respect to proceeding under a statutory violation
18 of the Property Disclosure Act. Additionally, the
19 remedy of rescission is not available under the
20 Act because the provisions of 55-2515 requires the
21 document of rescission to be delivered to the
22 transfer within three business days after the
23 property disclosure form is received, and that has
24 not occurred. So there is no statutory violations
25 that are in existence here, and as a matter of

1 law, I think the Merceas are entitled to summary
2 judgment.

3 Now, actual fraud, which I'm not sure has
4 really been alleged or argued here, requires nine
5 specific elements that must be pled with
6 particularity. Again, I would remind the parties,
7 which I think is clear that there were no actual
8 disclosures relevant to this public right-of-way
9 that were made that could give rise to the basis
10 for an actual fraud claim and nonetheless is not
11 properly pled, so this is not a claim for actual
12 fraud.

13 The only claim that I think should
14 properly advance in this case, and I think it
15 really boils down to the issue of the constructive
16 fraud. The constructive fraud under the case law
17 in the Court's opinion does include certain
18 elements, which would include not necessarily a
19 disclosure but also a nondisclosure, and I think
20 that's the issue here is constructive fraud in
21 terms of a nondisclosure.

22 In this case, the elements basically would
23 be that there was a nondisclosure, that the
24 plaintiff relied upon the defendant's
25 nondisclosure, that the plaintiff's reliance was

1 material to the transaction and the plaintiff was
2 damaged as a proximate result of the
3 nondisclosure. Included in these elements, I
4 think, would be critical and that is the duty to
5 make a disclosure.

6 And there can be a duty to disclose if
7 there is a fiduciary duty or other similar
8 relation of trust and confidence between the two
9 parties. The second basis would be an order to
10 prevent a partial statement of the facts from
11 being misleading or, finally, if the fact known by
12 one party and not the other is so vital that if
13 the stakes were mutual, the contract would be
14 voidable, and the party knowing that fact also
15 knows that the other does not know it.

16 In this case, I don't believe that there's
✓ 17 really a fiduciary duty between a buyer and a
18 seller of real property. However, under the first
19 element, there potentially could be a similar
20 relationship of trust or confidence between the
21 two parties. The Court has examined the Bethlahmy
22 case, the Sowards case, the St. Alphonsus Regional
23 Medical Center vs. Krueger case that all discuss
24 the impact of the special relationship.

25 And I think that what we're left with here

1 is arguably a factual question on this cause of
2 action with respect to constructive fraud. One of
3 the highlights of the argument that both counsel
4 have focused on here today is the photographs that
5 have been very helpful to the Court. Mr. Anson
6 has persuasively argued that it would appear to be
7 very obvious that there is a public right-of-way
8 that would provide access to other properties in
9 the area adjacent to the property that Ms. James
10 had purchased, that that is further supported by
11 the law in terms of constructive notice with
12 respect to the plat that was provided in this
13 transaction. Those are certainly facts that are
14 highly persuasive and lead this Court to the
15 comment that I made earlier that summary judgment
16 probably should be granted, or at least that was
17 my instinct.

18 However, Mr. Whelan has also argued to the
19 Court that what appears to be the apparent
20 observation that his client has relied on and that
21 is is that when she observed this property and she
22 made her inspection, it looked to her like she had
23 this one continuous driveway leading right up to
24 her property. Notwithstanding what the plat maps
25 may have stated, it had appeared to her that this

1 was her limited access.

2 Now, that may have been an erroneous
3 assumption, as has been argued by the defense here
4 today. The Court, I think, looks at this from the
5 standpoint that this, in fact, would be an item of
6 fact upon which an inference should be drawn in
7 favor of the non-moving party at least sufficient
8 enough to justify that summary judgment should not
9 be granted.

10 So in a nutshell here in terms of all of
11 the claims that have been advanced by the
12 plaintiff against the Merceas, the Court would
13 grant summary judgment with all of those with the
14 exception of the constructive trust cause of
15 action.

16 And so, Mr. Anson, you can prepare an
17 order which would grant in part and deny in part
18 the summary judgment as I've set forth on the
19 record here.

20 MR. ANSON: Yes, your Honor.

21 THE COURT: Do you have any questions
22 about that?

23 MR. ANSON: No, I don't believe I do.

24 THE COURT: Mr. Whelan?

25 MR. WHELAN: Judge, did you accidentally

1 say constructive trust or --

2 THE COURT: I accidentally said
3 constructive trust. I'm not going to add any more
4 causes of action here. Constructive fraud. Thank
5 you very much.

6 MR. WHELAN: The constructive fraud cause
7 of action goes forward?

8 THE COURT: All right. Thank you, sir.

9 And did you have any other questions,
10 Mr. Olson? It know it may have some bearing on
11 what we're about to do.

12 MR. OLSON: No, your Honor.

13 THE COURT: Do the Lamphiears have any
14 questions right now?

15 MRS. LAMPHIEAR: No, your Honor.

16 THE COURT: With that, we'll turn on to
17 the other motions that are in front of the Court.

18 (Whereupon the partial transcript is
19 concluded.)

20 * * *

21

22

23

24

25

C E R T I F I C A T E

STATE OF IDAHO)
COUNTY OF KOOTENAI)

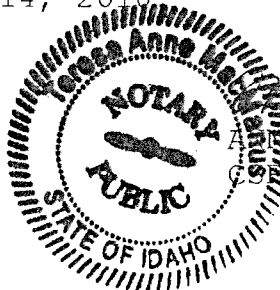
I, ANNE MACMANUS, a duly certified
court reporter in the State of Idaho, DO HEREBY
CERTIFY:

That the foregoing transcript,
contained in pages 1 through 16, is a complete,
true, and accurate transcription, to the best of
my ability, of my shorthand notes taken down at
said time and place in the above-entitled
litigation.

That said transcript contains all
material designated in the Notice of Appeal, any
Cross-Appeal, or any requests for additional
transcript which have been served on me.

I FURTHER CERTIFY that I am not
related to any of the parties or attorneys to this
litigation and have no interest in the outcome of
said litigation.

IN WITNESS WHEREOF, I have hereunto
set my hand on May 14, 2010



ANNE MACMANUS, CSR
No. 905

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED:

2/15/09 10:00 AM
CLERK, DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CASE NO. CV-09-992

CORNELIUS MERCEA and
PATRICIA MERCEA, husband and
wife, JOE A. LAMPHEAR and
SUSAN M. LAMPHEAR, husband
and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

**DECISION: MOTION FOR
SUMMARY JUDGMENT
(Reconsideration)**

CORNELIUS MERCEA and
PATRICIA MERCEA, husband and
wife,

Crossclaimants,

JOE A. LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife,
Crossdefendants

Plaintiff brought an action for damages, declaratory relief and rescission of a real estate purchase and sale agreement claiming breach of warranty of title, non disclosure under the Real Property Disclosure Statement and constructive fraud.

John P. Whelan, P.C. attorney for plaintiff.
Edward J. Anson, WITHERSPOON KELLEY, attorney for
Cornelius and Patricia Mercea
Joe A. Lamphiear and Susan M. Lamphiear, attorney
pro se.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case involves a single family residence located at 1111 Crestline Drive in Coeur d' Alene, Idaho. Access to the property is provided by a private driveway which is the focus of this litigation. The driveway connects to a public right of way which connects to Crestline Drive. The Lamphiears built the home in 2006 and as part of the construction they were required by the city to pave the public right of way. The paving lends an appearance that the private drive is larger than the actual legal boundaries of the property.

Lamphiear sold the home to Mercea during 2006. After moving to Arizona Mercea listed the property for sale. During the spring of 2008 Diana James was interested in purchasing a home in the Coeur d' Alene area. James, working through her realtor located the Merceas' property through the Multiple Listing Service. Negotiations ensued and the parties entered into a Purchase and Sale Agreement for the sum of \$375,000.00. James was able to inspect the home prior to the purchase, however, Merceas never spoke directly to James nor did they ever personally meet with her at any time prior to closing the transaction.

When James viewed the home it appeared to have a driveway that ran from the street to the garage and front door area of the house. The home did not have a front yard per se, as the paved asphalt driveway extended all the way to the front door. James claims that when a

reasonable person looks at the home nothing indicates that the driveway was anything but a typical driveway when in fact a fifteen foot right of way runs down the middle of the driveway.

In James' complaint she claims that she received a Real Property Disclosure Statement from Merceas that recited that there were no conditions that might affect the ability of Defendants Mercea to provide clear title. Additionally James based claims alleging failure to disclose problems relating to easement and encroachment issues adversely impacting the property. James also included claims against Lamphiear for breach of warranty of title as well as allegations against the title company.

Defendants sought summary judgment that was decided by the court on February 4, 2010. The court granted summary judgment dismissing certain causes of action alleged either directly or by inference from the pleadings:

1. Granted Summary Judgment dismissing any cause of action seeking to recover based upon defective title;
2. Granted Summary Judgment dismissing any cause of action based upon a claim of encroachment;
3. Granted Summary Judgment based upon any statutory claims related to the property disclosure form under the provisions of **I.C. § 55-2501** including any claim for rescission as a remedy under the statutory claim;

4. Granted Summary Judgment for any claim for actual fraud.

The court denied summary judgment with regard to any claim by James against Merceas for constructive fraud.

The order granting summary judgment had effectively dismissed Lamphiears from the lawsuit. Merceas, however, presented a crossclaim against Lamphiears based upon the same constructive fraud theory James was advancing against Merceas. In other words Merceas sought to protect themselves from a judgment that may be based upon a non disclosure regarding the driveway in their sale to James upon the theory that a similar non disclosure was present when they purchased from Lamphiears.

On April 19, 2010 Merceas filed a Motion for Reconsideration of the court's ruling regarding the presence of a contested factual issue regarding the duty to disclose information regarding the driveway. Lamphiears also sought summary judgment against Merceas seeking dismissal of the crossclaim. Those motions as well as a motion by James to strike portions of Merceas' answer and a Motion to Reconsider were combined for hearing on May 24, 2010. At the conclusion of the hearing the matters were taken under advisement by the court.

STANDARDS FOR MOTION TO RECONSIDER

Motions for reconsideration may be made under **Rule 11(a)(2)(B)**. The rule provides that a party may seek reconsideration of an

interlocutory order of the trial court prior to the entry of the final judgment. A party seeking a motion for reconsideration is permitted to present new evidence but is not required to do so. **Johnson v. Lambros**, 143 Idaho 468, 147 P.3d 303 (2008). On a motion for reconsideration of the facts deemed established, the trial court should reconsider those facts in light of any new or additional facts that are submitted in support of the motion. **Coeur d'Alene Mining Co. v. First National Bank**, 118 Idaho 812, 800 P.2d 1026 (1990).

STANDARDS FOR SUMMARY JUDGMENT

Rule 56, Idaho Rules of Civil Procedure, provides for summary judgment where there is no genuine issue and the moving party is entitled to judgment as a matter of law. In order to make that determination, the court must look to “the pleadings, depositions, and admissions on file, together with the affidavits, if any”

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. Where a jury has been requested, the party opposing the motion is to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied. **Roell v. City of Boise**, 130 Idaho 197, 938 P.2d 1237 (1997); **Bonz v. Sudweeks**, 119 Idaho 539, 808 P.2d 876 (1991).

Once the moving party has properly supported the motion for summary judgment, the non-moving party must come forward with evidence which contradicts the evidence submitted by the moving party and which establishes the existence of a material issue of disputed fact. ***Zehm v. Associated Logging Contractors, Inc.***, 116 Idaho 349, 775 P.2d 1191 (1988).

The opposing party cannot rest upon mere allegations or denials, but the party's response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue of material fact. ***I.R.C.P. 56(e); Smith v. Meridian Joint School District No. 2***, 128 Idaho 714, 918 P.2d 583 (1996); ***G & M Farms v. Funk Irrigation Co.***, 119 Idaho 514, 808 P.2d 851 (1991); ***Edwards v. Conchemco, Inc.***, 111 Idaho 851, 727 P.2d 1279 (Ct.App. 1986). Motions for summary judgment must be decided upon facts shown, not upon facts that might have been shown. ***Verbillis v. Dependable Appliance Co.***, 107 Idaho 335, 689 P.2d 227 (Ct.App. 1984).

When there is a conflict in the evidence which is presented, a determination should not be made on summary judgment if the credibility can be tested by testimony in court before the trier of fact. ***Argyle v. Slemaker***, 107 Idaho 668, 691 P.2d 1283 (Ct.App. 1984). judgment as a matter of law. ***Zumwalt v. Stephan, Balleisen & Slavin***, 113 Idaho 822, 748 P.2d 405 (Ct.App. 1987), ***rev. denied*** (1988).

According to **Berg v. Fairman**, 107 Idaho 441, 444, 690 P.2d 896, 900 (1984), the “purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain.”

DISCUSSION

At the conclusion of the hearing on the summary judgment motion the court ruling provided that James’ claim for constructive fraud could proceed to trial based upon an arguable factual question. Merceas base their Motion for Reconsideration upon their assertion that the existence of a duty to make a disclosure under constructive fraud is a question of law and not a question of fact. Therefore Marceas urge the court to reevaluate whether a duty exist in this case.

An action for constructive fraud may lie where there is a non disclosure of a material fact where a duty to disclose is present. **Bethalahmy v. Bechtel**, 91 Idaho 55, 415 P.2d 698 (1966). To establish fraud, a plaintiff is required to prove, by clear and convincing evidence, that (a) there was nondisclosure; (b) that plaintiff relied upon defendant’s nondisclosure; (c) that plaintiff’s reliance was material to the transaction; and (d) that plaintiff was damaged as proximate result of nondisclosure. **Watts v. Krebs**, 131 Idaho 616, 962 P.2d 387 (1998). To this list of elements can be added the element that there must be a duty to disclose.

Mercea correctly points out that the existence of a duty is a question of law and not a question of fact. ***Turpen v. Granieri***, 133 Idaho 244, 985 P.2d 699 (1990). The determination of such a duty by the court, however, is still dependent upon the factual circumstances presented. The gist of a constructive fraud finding is to avoid the need to prove intent (i.e., knowledge of falsity or intent to induce reliance) since it is inferred directly from the relationship and the breach. ***Country Cove Development Inc. v. May***, 143 Idaho 595, 150 P.3d 288 (2006). A party may be under a duty to disclose: (1) if there is a fiduciary or other similar relation of trust and confidence between the two parties; (2) in order to prevent partial statement of the facts from being misleading; or (3) if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows the other does not know it. ***Sowards v. Rathbun***, 134 Idaho 702, 8 P.3d 1245 (2000).

The critical facts on the question before the court are largely undisputed. There was no fiduciary duty or other relationship of trust between James and Mercea. This was a simple arms length transaction. This case involves a real estate purchase and sale agreement in connection with a single family residence. The home was marketed through the Multiple Listing Service and the transaction was handled by

real estate professionals representing the parties. There is nothing of significance that would establish a special relationship recognized under the law that would give rise to a basis for a constructive fraud claim.

There was no direct contact between the parties and therefore no express representation beyond what was set forth in the Property Disclosure Statement. There are no statements that were made regarding the nature of the disputed driveway. Therefore, constructive fraud does not serve to prevent a partial statement from being misleading.

In order for a duty to disclose to exist in this case, therefore, Mercea must have known that the driveway to the home was misleading with respect to the location of the public right of way and further that they were aware that James did not know about the misleading nature of the driveway. For the purposes of summary judgment the court will assume that an inference can be drawn that Merceas were aware of the location of the right of way and the material impact that it had on their property. The question becomes whether they were aware that James was ignorant of this fact.

The evidence is not present to support such a conclusion, even applying the favorable inferences to James. It is undisputed that the contract between the parties included an accurate legal description of the boundaries of the property. A plat map was included that clearly shows the presence of the public right of way. A visual inspection of the property reveals the roadway and the access to the adjacent lot. The

evidence before the court reveals that Merceas sold their property with an understanding that the buyer, James had knowledge of the public right of way. There is no legal duty present in this case imposed upon the Merceas to disclose information to James to dispel an assumption expressly contrary to the information provided and available.

Upon reconsideration the court concludes that Marceas are entitled to summary judgment dismissing the claim for constructive fraud. Consequently a similar analysis applies to the transaction between Lamphiears and Merceas, therefore, the crossclaim fails as well. Lamphiears' Motion for Summary Judgment is granted as well.

James has raised two additional issues that are essentially moot based upon the foregoing. James sought to have the court reconsider the entry of the Partial Summary Judgment based upon the fact that it did not comply with the court's pronouncements. James is correct that the court only dismissed the remedy of rescission as it pertained to the statutory claim. Such a remedy may have still been available upon the survival of the constructive fraud. Otherwise, the order was properly entered and certainly clarified in this Decision above.

Finally James sought to strike Merceas' answer under **I.C.R.P. 12(f)**. The court sees no basis to grant such relief, even if the claims against Mereas were to survive.

Counsel for the Defendant Mercea and Lamphiear, pro se are hereby directed to prepare a separate Judgment pursuant to **Idaho Rule of Civil Procedure 58(e)** consistent with the foregoing Decision.

Dated this 24th Day of June 2010



John Patrick Luster
District Judge

I hereby certify that on the 25 day of June, 2010, a true and correct copy of the foregoing was sent via FAX to:

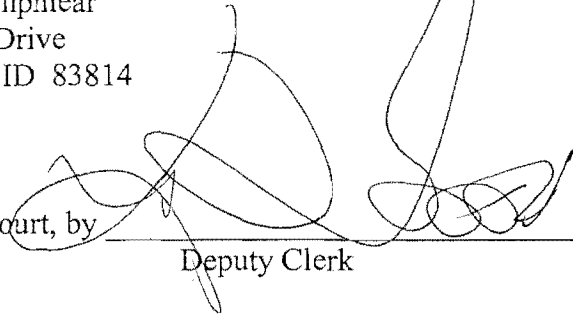
John Whelan
FAX 664-2240

Ed Anson
FAX 667-8470

And mailed to:

Joe and Sue Lamphiear
1021 Crestline Drive
Coeur d'Alene, ID 83814

DANIEL J. ENGLISH, Clerk of the Court, by


Deputy Clerk

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

2010 JUL -6 AM 11:45

CLERK OF DISTRICT COURT

DEPUTY

Edward J. Anson, ISB No. 2074
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Telephone: (208) 667-4000
Facsimile: (208) 667-8470

*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M. LAMPHIEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

AFFIDAVIT AND MEMORANDUM
OF COSTS AND ATTORNEY'S FEES

STATE OF IDAHO)

:SS

County of Kootenai)



1 Edward J. Anson, being first duly sworn, on oath, deposes and says:

2 1. That he is a member of the firm of WITHERSPOON KELLEY, attorneys for the
3 Merceas herein. That he makes this affidavit on the basis of his personal knowledge.

4 2. That your affiant is well informed as to the attorneys' fees and costs incurred in
5 this action and states and represents that the fees and costs below set forth were in fact incurred
6 in this action. That the attorneys' fees were calculated on the basis of my hourly rate of
7 \$240.00 per hour, Attorney Kimberly A. Kamel's hourly rate of \$215.00 per hour, and Attorney
8 Jason S. Wing's hourly rate of \$150.00 per hour.

9 3. That your affiant states that to the best of his knowledge all items set forth in
10 this Memorandum are correct, and that all items claimed are in compliance with Rule 54.

11 4. That the time and labor required for this action is itemized and set forth below,
12 and is typical for a case of this nature. Edward J. Anson (EJA), as lead counsel, has been
13 licensed to practice law in the State of Idaho since 1977 and practices primarily in the areas of
14 banking, real property, commercial, and litigation. Kimberly A. Kamel (KAK) is a Principal
15 with Witherspoon Kelley and has been licensed to practice law in the State of Washington
16 since 2000 and in the State of Idaho since 2005. She practices primarily in the areas of
17 litigation, real property, and employment law. Jason S. Wing (JSW) is an Associate with
18 Witherspoon Kelley and has been licensed to practice law in the State of Idaho since 2008. He
19 practices primarily in the area of litigation.

20 5. That your Affiant is well informed as to the hourly rates of counsel with similar
21 skill, knowledge, and experience in the State of Idaho, and states that the attorneys' fees sought
22 are similar to prevailing charges for like work. The fee charged was fixed and based upon the
23 hourly rates.

24 6. That a substantial amount of time and labor was required in this case. The case
25 involved novel and difficult questions of law. The time limitations imposed by the
26 circumstances of the case were typical of a case of this nature. The case involved causes of
27 action seeking damages upon defective title, upon a claim of encroachment, upon a claim under
28 the property disclosure form and for claims for actual and constructive fraud. In addition to

1 damages, the Plaintiff sought rescission of a real estate purchase agreement in the amount of
2 \$370,000.00 presumably together with interest. The result that the Merceas obtained was the
3 dismissal in its entirety of the Complaint of the Plaintiff as against the Merceas with prejudice.

4 7. There is nothing particularly desirable or undesirable about the case. The
5 Merceas were not an established client to the law firm.

6 8. The award of attorneys' fees sought is similar to the awards in similar cases.

7 9. That other than the Court filing fee, all costs sought hereunder are discretionary
8 costs that were necessary and exceptional costs reasonably incurred and should in the interest
9 of justice be assessed against the Plaintiff. That it further was reasonable and necessary to use
10 computer assisted legal research in the preparation of the case. It was necessary to obtain a real
11 estate appraiser to form an expert opinion as to the value of the subject real property as of the
12 date of purchase by the Plaintiff comparing the value of the property "as is" as compared to
13 Plaintiff's assumed conception of the property. In response to a motion by Plaintiff regarding
14 the form of an Order, it became necessary to obtain a copy of the transcript of the partial
15 hearing that led to the entry of the Order.

16 10. That the following is a true and accurate account of the costs and fees associated
17 with this action as charged to Plaintiff:
18

19 **COSTS**

20 DESCRIPTION	AMOUNT
21 Filing Fee	72.00
22 Appraisal Fee (Morse & Co.)	2,350.00
23 Computer Assisted Research	497.83
24 Transcript	68.00
25	
26 TOTAL COSTS	\$2,987.83
27	
28	

ATTORNEYS' FEES

DATE	ATTORNEY	DESCRIPTION	TIME
4/13/09	EJA	Review materials' phone conference with Atty. Whelan; phone conference with client	1.80
4/14/09	EJA	Travel to/from property for viewing and photo graphing with Atty Whelan.	1.60
4/16/09	EJA	Draft correspondence to Atty Whelan; research; phone conference with Whelan's office; review documents from Atty Whelan.	3.00
4/17/09	EJA	Commence drafting answer to complaint	.60
4/20/09	EJA	Research; continue drafting answer and cross claim; phone conference with client.	2.80
4/21/09	EJA	Continue drafting answer and cross claim; phone conference with client; legal research.	3.70
4/22/09	EJA	Review email correspondence from client; phone conference with client re client questions concerning proposed answer and cross claim.	1.00
4/23/09	EJA	Finalize answer and cross claim; draft correspondence to Atty Whelan; research.	1.30
5/13/09	EJA	Phone conference with Atty Whelan; draft correspondence to client.	.50
5/14/09	EJA	Draft correspondence to client; review correspondence to client.	.40
6/3/09	EJA	Phone conference with Atty Olsen, Counsel for First American Title Co.	.40
6/5/09	EJA	Review Lamphiear answer; draft correspondence to client; draft correspondence to Lamphiear.	.60
6/9/09	EJA	Draft affidavit of service; draft correspondence.	.30

1	6/10/10	EJA	Review file for preparation of drafting discovery requests.	.40
2	6/16/09	EJA	Continue working on discovery requests.	1.50
3	6/18/09	EJA	Review and finalize discovery requests; draft correspondence to client re same.	1.30
4				
5	7/24/09	EJA	Review discovery responses; draft correspondence to client re same.	.30
6				
7	9/29/09	EJA	Review email correspondence from client; review file.	.80
8				
9	9/30/09	EJA	Review file re summary judgment; phone conference with Atty Olson.	1.00
10				
11	10/1/09	EJA	Research re summary judgment issues; office conference with Atty Wing; draft correspondence to client; phone conference with Atty Olson.	2.30
12				
13				
14	10/1/09	JSW	Office conference with Atty Anson re research on summary judgment issues and affirmative defenses.	.20
15				
16	10/2/09	JSW	Research and draft memo re plaintiff's claims for summary judgment.	2.60
17				
18	10/5/09	EJA	Attend status conference.	.50
19	10/5/09	JSW	Research re failure to state a claim.	.40
20				
21	10/8/09	EJA	Draft correspondence to client; draft correspondence to Atty Whelan.	.40
22	10/13/09	EJA	Research re summary judgment issues.	.80
23	10/16/09	EJA	Research summary judgment issues.	1.50
24				
25	10/30/09	EJA	Research summary judgment issues.	1.00
26	11/5/09	EJA	Draft affidavits of Atty Anson and client.	1.30
27	11/6/09	EJA	Research summary judgment issues.	1.40
28				

1	11/9/09	EJA	Revise affidavits.	.80
2	11/11/09	EJA	Draft joint affidavit; review materials; phone	1.80
3			conference with client; phone conference with	
4			Heidi Acuff; continue working on summary	
5			judgment materials.	
6	11/12/09	EJA	Office conference with real estate agents	1.80
7			Heidi Acuff and Carrie Oja; research;	
8			continue working on summary judgment	
9			pleadings.	
10	11/17/09	EJA	Review correspondence from client.	.20
11	11/23/09	EJA	Review correspondence from client; reply to	.30
12			client.	
13	11/25/09	EJA	Review draft of affidavit and revise.	.30
14	11/30/09	EJA	Phone conference with client; draft and revise	5.00
15			affidavits and statement of facts; research	
16			regarding summary judgment issues.	
17	12/7/10	EJA	Research regarding summary judgment	4.80
18			issues; draft statement of facts.	
19	12/8/09	EJA	Revise statement of facts; draft memorandum	4.00
20			in support of summary judgment motion.	
21	12/9/09	EJA	Revise statement of uncontested material	4.50
22			facts; phone conference with court regarding	
23			scheduling; draft and revise memorandum in	
24			support of summary judgment motion.	
25	12/11/09	EJA	Finalize summary judgment materials;	2.30
26			conference with Atty Whelan; draft	
27			correspondence to client; draft	
28			correspondence to Judge Luster.	
29	12/22/09	EJA	Review expert witness issues.	.30
30	12/23/09	EJA	Draft correspondence to client.	.30
31	12/24/09	EJA	Phone conference with client.	.30
32	12/28/09	EJA	Phone conference with Atty Olson; draft	.40
33			correspondence to Atty Olson.	

1				
2	12/29/09	EJA	Phone conference with Atty Olson; review	.50
3			First American discovery request; draft	
4			correspondence to Atty Olson; draft	
5			correspondence to client.	
6	1/12/10	EJA	Phone conference with Atty Olson.	.30
7	1/14/10	EJA	Phone conference with Ed Morse.	.20
8	1/15/10	EJA	Phone conference with Ed Morse; phone	2.50
9			conference with Atty Olson; prepare for	
10			meeting with Ed Morse; phone conference	
11			with client; meeting with Ed Morse.	
12	1/19/10	EJA	Review correspondence from client.	.20
13	1/21/10	EJA	Review Whelan's pleadings re opposition to	1.30
14			motion for summary judgment; draft	
15			correspondence to client; phone conference	
16			with Atty Olson; review Lamphiear discovery	
17			responses.	
18	1/22/10	KAK	Draft summary judgment reply; research;	2.50
19			interoffice conference with Atty Anson.	
20	1/22/10	EJA	Work on reply to opposition to motion for	.60
21			summary judgment.	
22	1/25/10	KAK	Draft summary judgment reply with case law.	2.50
23	1/26/10	KAK	Edit summary judgment reply.	1.40
24	1/26/10	EJA	Work on reply brief; phone conference with	1.20
25			client.	
26	1/27/10	EJA	Finalize reply memorandum research; phone	1.20
27			conference with Ed Morse; phone conference	
28			with client.	
	1/29/10	EJA	Review First American pleadings.	.40
	2/1/10	EJA	Prepare expert witness disclosure; phone	1.80
			conference with Ed Morse; meeting with Ed	
			Morse.	

1	2/2/10	EJA	Review pleadings from title company and Lamphiear.	.40
2	2/3/10	EJA	Phone conference to client; prepare for hearing.	1.40
3	2/4/10	EJA	Preparation for summary judgment hearing; attend hearing; phone conference with client.	3.30
4				
5	2/8/10	EJA	Review correspondence from Atty Olson; conference with Ed Morse.	.30
6				
7	2/19/10	EJA	Phone conference to Atty Whelan.	.30
8	2/24/10	EJA	Phone conference to Atty Whelan.	.20
9				
10	3/2/10	EJA	Phone conference to client.	.20
11	3/4/10	EJA	Conference with Atty Whelan.	.30
12	3/9/10	EJA	Phone conference with Atty Whelan.	.20
13	3/10/10	EJA	Research.	.80
14	3/11/10	EJA	Research	.80
15	3/15/10	EJA	Research; draft order re summary judgment.	2.80
16				
17	3/16/10	EJA	Draft order; phone conference with client.	1.20
18	3/17/10	EJA	Finalize proposed order; draft correspondence to client.	.40
19				
20	3/19/10	EJA	Review amended complaint, discovery responses, and disclosure of expert witnesses; draft correspondence to client.	.50
21				
22	4/8/10	EJA	Review pleadings.	.50
23	4/9/10	KAK	Review pleadings filed by Lamphiear on summary judgment; review summary judgment order; interoffice conference with Atty Anson; research question of law on duty issue; research duty for latent or patent defect; research other jurisdictions re duty to disclose patent defect.	3.30
24				
25				
26				
27				
28				

1	4/9/10	EJA	Research re summary judgment issues.	3.00
2	4/14/10	EJA	Phone conference with Atty Whelan.	.40
3	4/15/10	EJA	Research.	3.00
4	4/16/10	EJA	Work on brief; research.	3.00
5	4/18/10	EJA	Research; work on brief.	2.80
6	4/19/10	EJA	Research; draft motion for reconsideration.	2.30
7	4/20/10	EJA	Research.	.80
8	4/21/10	KAK	Begin draft of motion for reconsideration; draft pleading; review case law.	.90
9	4/22/10	KAK	Print cases and draft memorandum; interoffice conference with Atty Anson.	1.10
10	4/22/10	EJA	Research regarding motion for reconsideration.	1.70
11	4/23/10	KAK	Phone conferences with Atty Anson; draft memorandum in support of motion for reconsideration; edit memorandum.	2.50
12	4/23/10	EJA	Revise memorandum.	1.00
13	4/27/10	EJA	Research.	2.00
14	4/29/10	EJA	Research; draft memorandum in support of reconsideration.	4.50
15	4/30/10	EJA	Draft, revise, and finalize memorandum in support of reconsideration; draft correspondence to judge; draft correspondence to client.	3.30
16	5/4/10	EJA	Draft answer to amended complaint.	1.00
17	5/5/10	EJA	Draft and revise answer to amended complaint; draft memorandum in opposition to Lamphiear's motion for summary judgment; draft correspondence to Judge Luster; draft correspondence to client; research re summary judgment issues.	5.80
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1
2 5/10/10 EJA Phone conference with court reporter. .20
3 5/13/10 EJA Phone call with court reporter. .30
4 5/14/10 EJA Draft response; review transcript; draft .40
5 correspondence to client.
6 5/19/10 EJA Draft correspondence to client. .20
7 5/25/10 EJA Prepare for hearing on motion to reconsider; 2.80
8 attend court hearing; phone conference with
9 client.

10 EJA TOTAL 121.9 \$29,256.00

11 KAK TOTAL 14.2 \$3,053.00

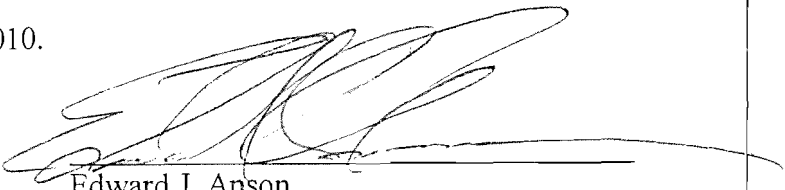
12 JSW TOTAL 3.2 \$480.00

13 TOTAL ATTORNEY'S FEES \$32,813.00

14 TOTAL ATTORNEY'S FEES AND \$35,800.83

15 COSTS

16
17 DATED this 6 day of July, 2010.

18
19
20 
21 Edward J. Anson
22 WITHERSPOON KELLEY
23 The Spokesman Review Building
24 608 Northwest Blvd, Suite 300
25 Coeur d'Alene, Idaho 83814
26 Attorneys for Defendants Mercea
27
28

CERTIFICATE OF SERVICE

I certify that on this the 6th day of July, 2010, I caused a true and correct copy of the AFFIDAVIT OF MEMORANDUM OF COSTS AND ATTORNEY'S FEES to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Via Fax: (208) 664-2240

Joe and Sue Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814
Pro Se

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail

Douglas S. Marfice
P.O. Box 1336
Coeur d'Alene, Idaho 83816

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Via Fax: (208) 664-5884


Tina Marie Bell

RAMSDEN & LYONS, LLP
700 Northwest Blvd.
Post Office Box 1336
Coeur d'Alene, Idaho 83816-1336
Telephone: (208) 664-5818
Facsimile: (208) 664-5884
Douglas S. Marfice, ISB #4072

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 11-13-03 BY 60322

2010 JUN -8 AM 10:54

CLERK DISTRICT COURT
Paul Thompson
DEPUTY

Attorneys for Defendant First American Title Company, Inc.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M. LAMPHIEAR,
husband and wife, FIRST AMERICAN
TITLE INSURANCE CO., FIRST
AMERICAN TITLE COMPANY, INC.,

Defendants.

Case No. CV-09-992

**DEFENDANT FIRST AMERICAN
TITLE COMPANY, INC.'S
ANSWER TO PLAINTIFF'S
AMENDED COMPLAINT AND
DEMAND FOR JURY TRIAL**

COMES NOW Defendant First American Title Company, Inc. ("First American"), by and through its counsel of record, Ramsden & Lyons, LLP, in answer to Plaintiff Diana James's ("Plaintiff") Amended Complaint and Demand for Jury Trial (Amended Complaint), admits, denies, and alleges as follows:

I.

FIRST DEFENSE – FAILURE TO STATE A CLAIM

Plaintiff's Amended Complaint, and each and every allegation therein, fails to state a claim against First American upon which relief may be granted and should be dismissed pursuant to Rule 12(b)(6) of the Idaho Rules of Civil Procedure.

II.

GENERAL RESPONSE TO ALLEGATIONS

First American denies each and every allegation contained in Plaintiff's Amended Complaint unless expressly and specifically admitted herein.

III.

SPECIFIC RESPONSES TO ALLEGATIONS

1. In response to Paragraph 1, First American admits that Plaintiff is an individual; First American is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 1 and therefore denies the same.

2. In response to Paragraph 2, First American admits, upon information and belief, that Cornelius Mercea and Patricia Mercea, husband and wife ("Merceas"), were the owners of record of the following real property, commonly known as 1111 North Crestline Drive, Coeur d'Alene, Idaho ("Property"):

Lot 2, Block 1, CHERRY HEIGHTS, according to the plat recorded in the office of the County Recorder in Book "E" of Plats at Page 9, records of Kootenai County, Idaho.

First American is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 2 and therefore denies the same.

3. In response to Paragraph 3, First American is without knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore denies the same.

4. In response to Paragraph 4, First American admits the allegations set forth therein.

5. In response to Paragraph 5, First American is without knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore denies the same.

6. In response to Paragraph 6, First American admits, upon information and belief, that Merceas were the owners of record of the Property during a portion of 2008. First American is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 6 and therefore denies the same.

7. In response to Paragraph 7, First American is without knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore denies the same.

8. In response to Paragraph 8, First American admits, upon information and belief, that a recorded warranty deed declares that Joe A. Lamphiear and Sue M. Lamphiear, husband and wife ("Lamphiears"), conveyed the Property to Merceas on or about March 9, 2006. First American is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 8 and therefore denies the same.

9. In response to Paragraph 9, First American admits, upon information and belief, that Plaintiff and Merceas reached an agreement for the sale of the Property prior to April 4, 2008. First American is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 9 and therefore denies the same.

10. In response to Paragraph 10, First American is without knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore denies the same.

11. In response to Paragraph 11, First American admits, upon information and belief that: (a) a recorded warranty deed, dated April 2, 2008, signed by Merceas on April 3, 2008, and recorded on April 4, 2008, declares that Merceas conveyed the Property to Plaintiff; (b) First American Title Insurance Co. issued a preliminary commitment for title insurance and a title insurance policy with respect to the Property; (c) Plaintiff paid the purchase price to Merceas for the purchase of the Property; and (d) Plaintiff paid a portion of the premium for title insurance with respect to the Property. First American denies the remaining allegations in Paragraph 11. To the extent that the allegations in Paragraph 11 constitute legal conclusions, no response is required. If a response is deemed to be required, First American denies the allegations in Paragraph 11.

12. In response to Paragraph 12, First American admits that the plat for the Cherry Heights subdivision is recorded in Book E of Plats, Page 9, official records of Kootenai County, Idaho ("Plat") and that the Plat depicts a right of way adjacent to the eastern boundary of the Property ("Right of Way"). In further response, First American admits, upon information and belief, that there is an asphalt drive on the Right of Way running from Crestline Drive that provides access to Lot 3, Block 1 Cherry Heights subdivision (to the north/northwest of the Property), the Property, the property to the east of the Right of Way (which appears to be Lot 1, Block 2 Cherry Heights 1st Addition), and to an undeveloped parcel of property that lies to the south and east of the Property. First American denies the remaining allegations in Paragraph 12 either generally or on the basis that it is without

knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore denies the same.

13. In response to Paragraph 13, First American admits that the Plat depicts the Right of Way adjacent to the eastern boundary of the Property. In further response, First American admits, upon information and belief, that: (a) the Right of Way provides access to an undeveloped parcel of property that lies to the south and east of the Property (which appears to be Lot 1, Block 1 Cherry Heights subdivision); (b) a recorded warranty deed, dated March 9, 2006, declares that Lamphiears conveyed the Property to Merceas; and (c) a recorded warranty deed, dated April 2, 2008, declares that Merceas conveyed the Property to Plaintiff. First American denies the remaining allegations in Paragraph 13 either generally or on the basis that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore denies the same.

14. In response to Paragraph 14, First American is without knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore denies the same. To the extent that the allegations in Paragraph 14 constitute legal conclusions, no response is required. If a response is deemed to be required, First American denies the allegations in Paragraph 14.

15. In response to Paragraph 15, First American is without knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore denies the same. To the extent that the allegations in Paragraph 15 constitute legal conclusions, no response is required. If a response is deemed to be required, First American denies the allegations in Paragraph 15.

16. In response to Paragraph 16, First American is without knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore denies the same. To the extent that the allegations in Paragraph 16 constitute legal conclusions, no response is required. If a response is deemed to be required, First American denies the allegations in Paragraph 16.

17. In response to Paragraph 17, First American denies the allegations therein either generally or on the basis that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein and therefore denies the same.

18. In response to Paragraph 18, First American denies the allegations therein. To the extent that the allegations in Paragraph 18 constitute legal conclusions, no response is required. If a response is deemed to be required, First American denies the allegations in Paragraph 18.

19. In response to Paragraph 19, First American denies the allegations therein. To the extent that the allegations in Paragraph 19 constitute legal conclusions, no response is required. If a response is deemed to be required, First American denies the allegations in Paragraph 19.

20. In response to Paragraph 20, First American denies the allegations therein.

21. In response to Paragraph 21, the purchase agreement referred to speaks for itself and, therefore, no response is required. First American denies the remaining allegations in Paragraph 21.

PLAINTIFF'S PRAYER FOR RELIEF

22. First American denies that Plaintiff is entitled to any of the relief set forth in her prayer for relief and any allegations contained therein,

IV.

DEFENSES

Plaintiff's claims are not stated separately. Therefore, the following defenses are not stated separately as to each claim for relief or allegation of Plaintiff. Nevertheless, the following defenses are applicable, where appropriate, to any and all of Plaintiff's claims for relief. In addition, First American, in asserting the following defenses, does not admit that the burden of proving the allegations or denials contained in the defenses is upon First American but, to the contrary, asserts that by reason of denials and/or by reason of relevant statutory and judicial authority, that the burden of proving the facts relevant to many of the defenses and/or the burden of proving the inverse of the allegations contained in many of the defenses is upon Plaintiff. Moreover, First American does not admit, in asserting any defense, any responsibility or liability of First American but, to the contrary, specifically denies any and all allegations of responsibility and liability in the Amended Complaint.

AFFIRMATIVE DEFENSES

FIRST DEFENSE

Plaintiff's Amended Complaint fails to sufficiently allege the times and places at which the events described therein allegedly occurred and such claims therefore are barred and/or subject to dismissal pursuant to Rule 9(f) of the Idaho Rules of Civil Procedure.

SECOND DEFENSE

Plaintiff was on actual and/or constructive notice of the legal description and boundaries of the Property and the Right of Way as set forth in the Plat.

THIRD DEFENSE

Plaintiff had actual and/or constructive notice of the public usage of the Right of Way.

FOURTH DEFENSE

Plaintiff is barred from maintaining this action against First American because Plaintiff's damages, if any, were proximately caused, in whole or in part, by the superseding, intervening acts and/or omissions of Plaintiff or others.

FIFTH DEFENSE

Plaintiff is barred from maintaining this action against First American by reason of Plaintiff's voluntary assumption of a known risk.

SIXTH DEFENSE

The damages sustained by the Plaintiff, if any, were proximately caused, in whole or in part, by the acts, both intervening and superseding, and/or omissions of parties and entities other than First American, over whom First American had no control and no right of control.

SEVENTH DEFENSE

Plaintiff's recovery in this case, if any, should be reduced or barred in accordance with Idaho Code § 6-801.

EIGHTH DEFENSE

Plaintiff's claims for damages against First American are barred by the economic loss rule.

NINTH DEFENSE

Some or all of Plaintiff's claims for alleged damage are purely speculative and uncertain, and Plaintiff is not entitled to recover any such alleged damages.

TENTH DEFENSE

Plaintiff is barred from maintaining this action against First American because Plaintiff, by failing to act reasonably, has failed to mitigate any damages to which Plaintiff may be entitled.

ELEVENTH DEFENSE

Plaintiff's recovery in this action, if any, should be reduced in accordance with the doctrine of avoidable consequences.

TWELFTH DEFENSE

First American has fully performed all contractual, statutory, or other duties owed to the Plaintiff, if any there were or if any there be, and Plaintiff is, therefore, barred from asserting any cause of action against First American.

THIRTEENTH DEFENSE

Plaintiff is barred from maintaining this action against First American based upon the doctrines of waiver, estoppel and/or quasi-estoppel.

V.

REQUEST FOR ATTORNEYS' FEES

First American hereby requests that it be awarded its costs and attorneys' fees incurred in defending this action pursuant to the parties' agreements and applicable law including, but not limited to, Idaho Code §§ 12-120, 12-121, and 12-123 and Rule 54 of the Idaho Rules of Civil Procedure.

VII.

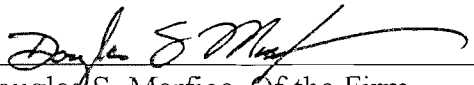
PRAYER FOR RELIEF

WHEREFORE, First American prays for this Court's judgment as follows:

1. That the Amended Complaint be dismissed, with prejudice, and that Plaintiff take nothing thereby;
2. That First American be awarded costs and attorneys' fees pursuant to the parties' agreements and applicable law including, but not limited to, Idaho Code §§ 12-120, 12-121, and 12-123 and Rule 54 of the Idaho Rules of Civil Procedure.
3. That First American be awarded such other and further relief as this Court may deem just and proper.

DATED this 7th day of July, 2010.

RAMSDEN & LYONS, LLP

By: 
Douglas S. Marfice, Of the Firm
Attorneys for Defendant First American
Title Company, Inc.

CERTIFICATE OF SERVICE

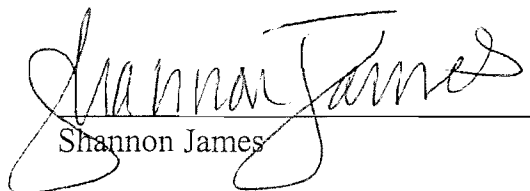
I hereby certify that on the 7th day of July 2010, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, ID 83814

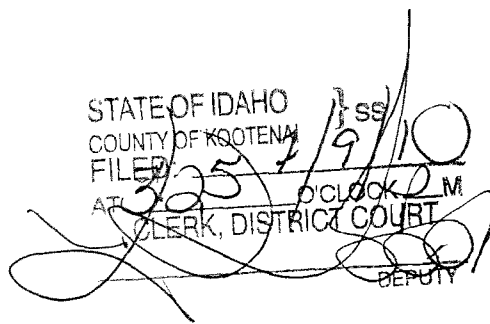
☒ US Mail
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile (208) 664-2240

Joe and Susan Lamphiear
1021 Crestline Drive
Coeur d'Alene, ID 83814

☒ US Mail
☐ Overnight Mail
☐ Hand Delivered
☐ Facsimile


Shannon James

Joe and Susan Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814



IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN
AND FOR THE COUNTY OF KOOTENAI

Diana James,
Plaintiff,
vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A
LAMPHIEAR and SUSAN M LAMPHIEAR
husband and wife, FIRST AMERICAN TITLE
INSURANCE CO.

Defendants

Case No. CV-09-992

JUDGMENT DISMISSING CROSSCLAIMS
MERCEAS CROSSCLAIM COMPLAINT AS
AGAINST CROSSDEFENDANTS
LAMPHIEARS

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife

Crossclaimants,

vs.

JOE A LAMPHIEAR and SUSAN M
LAMPHIEAR, husband and wife

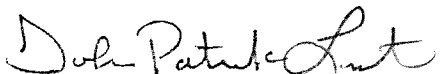
Crossdefendants,

Lamphiears Motion for Summary Judgment on Crossclaim by Crossclaimants Merceas was heard by the court on May 25, 2010. The Court, having heard the arguments of Lamphiears (Pro Se) and Merceas Counsel, the Court entered its written decision on June 25, 2010.

Lamphiear Motion for Summary Judgment on Crossclaim was granted in favor of Lamphiears dismissing all claims made in Crossclaim by Crossclaimants Merceas against Crossdefendants Lamphiears.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGE, AND DECREED that the Crossdefendants Lamphiears are hereby granted Summary Judgment dismissing in its entirety the Crossclaim complaint of Crossclaimants Merceas as against the Crossdefendants Lamphiears with prejudice.

DATED this 9th day of July, 2010


 Honorable John P. Luster
 District Judge

mailed 7/9/10 to Sue Lamphiear
 1021 Crestline Drive
 ADA, ID 83814
 Fax to Ed Anson : 667-8470

CERTIFICATE OF SERVICE

I certify that on this 10th day of July, 2010, I caused a true and correct copy of JUDGMENT DISMISSING CROSSCLAIMS MERCEAS CROSSCLAIM COMPLAINT AS AGAINST CROSSDEFENDANTS LAMPHEARS be forwarded with all required charges prepaid, by method(s) indicated below, to the following person(s).

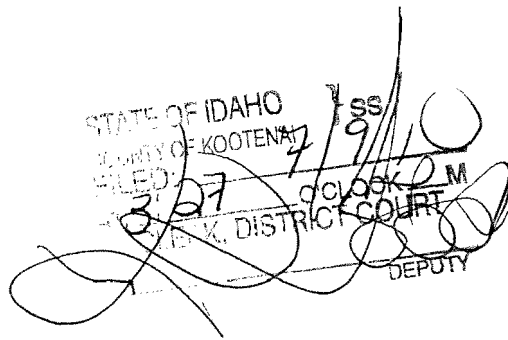
Edward J Anson
Witherspoon, Kelly, Davenport & Toole, P.S.
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d' Alene Id. 83814-2146

Attorneys for Crossclaimants Merceas

☐ U.S. Mail, Postage Paid
☒ Hand Delivered
☐ Overnight Mail
☐ E-Mail
☐ Fax


Sue Lamphear

Edward J. Anson, ISB No. 2074
WITHERSPOON KELLEY
Attorneys & Counselors
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Telephone: (208) 667-4000
Facsimile: (208) 667-8470
Email: ēja@witherspoonkelley.com



*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M. LAMPHIEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

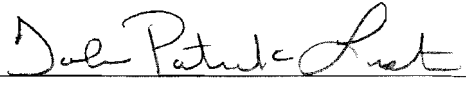
FINAL JUDGMENT DISMISSING
PLAINTIFF'S COMPLAINT AS
AGAINST DEFENDANTS MERCEA



1 This matter came on for hearing on May 25, 2010 upon the Defendants Mercea's Motion
2 for Reconsideration of that portion of this Court's Order re Merceas' Motion for Summary
3 Judgment entered on April 5, 2010 which granted to the Merceas Summary Judgment
4 dismissing all causes of action alleged by Plaintiff against them except for that cause of action
5 alleging constructive fraud. This Court, having heard the arguments of counsel and of the
6 parties, having reviewed the records and files herein, having been fully advised in the premises
7 and having entered its written decision on June 25, 2010,
8

9 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED
10 that the Defendants Merceas are hereby granted summary judgment dismissing in its entirety
11 the complaint of the Plaintiff as against the Merceas with prejudice. Any award of attorney fees
12 and costs shall be subject to subsequent ruling by this Court.
13

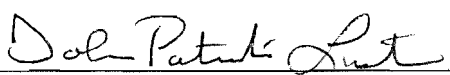
14 DATED this 9th day of July, 2010.

15
16 
17 John Patrick Luster,
18 District Judge
19

20 RULE 54(b) CERTIFICATE

21 With respect to the issues determined by the above judgment or order it is hereby
22 CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is
23 no just reason for delay of the entry of a final judgment and that the court has and does hereby
24 direct that the above judgment or order shall be a final judgment upon which execution may
25 issue and an appeal may be taken as provided by the Idaho Appellate Rules.

26 DATED this 9th day of July, 2010.

27 
28 John Patrick Luster,
District Judge

CLERK'S CERTIFICATE OF SERVICE

I certify that on this the 9th day of July, 2010, I caused a true and correct copy of FINAL JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT AS AGAINST DEFENDANTS MERCEA to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
Counsel for Plaintiff

- ☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile: (208) 664-2240

Joe and Sue Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814
Pro Se

- ☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail

Edward J. Anson
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

- ☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile: (208) 667-8470

2nd copy
given 7/12/10
WA

John K. Olson
P.O. Box 1617
Boise, Idaho 83701

- ☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile: (208) 954-5213

Douglas S. Marfice
Ramsden & Lyons, LLP
P.O. Box 1336
Coeur d'Alene, Idaho 83816-1336
*Attorneys for Defendant First American Title
Company, Inc.*

- ☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile: (208) 664-5884

Deputy Clerk of the Court



JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d' Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

STATE OF IDAHO } ss
COUNTY OF KOOTENAI }
FILED:

2010 JUL 20 PM 2:00

CLERK DISTRICT COURT
Chisan Reed
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife, FIRST
AMERICAN TITLE INSURANCE CO.,

Defendants.

CASE NO. CV-09-992

AFFIDAVIT OF JOHN P. WHELAN
IN SUPPORT OF PLAINTIFF'S
OBJECTIONS TO MEMORANDUM
OF COSTS AND ATTORNEY FEES
AND MOTION TO DISALLOW
COSTS

Hearing Date: August 19, 2010
Time: 3:00 p.m.

Judge: John P. Luster

STATE OF IDAHO)

) ss.

County of Kootenai)

John P. Whelan, being first duly sworn deposes and says:

1. I am the attorney for the Plaintiff, Diana James, in this action. I have personal knowledge of the following facts and could competently testify.

2. I have been licensed to practice law for twenty-eight (28) years. The hourly rate which I charge my clients, \$200.00 per hour, is commensurate with the rates charged by other attorneys in this area.

3. I was shocked and dismayed by the Affidavit and Memorandum of Costs filed in this action by Edward Anson. The above-entitled action stemmed from a real estate transaction between Diana James, the Plaintiff, and Cornelius Mercea and Patricia Mercea. In the action, the Plaintiff claimed that the sellers, the Merceas, failed to disclose relevant facts affecting the residential home sold to Plaintiff by the Merceas.

4. The time devoted to this matter by the Merceas' counsel, Ed Anson, centered around a summary judgment motion and a motion for reconsideration. The Merceas' motion for summary judgment contained only four pages of argument and text and cited only (8) cases, half of which pertained to dedication of easements, an issue of no consequence in the action. The other four cases pertained to shareholder derivative actions and the failure to state a claim, also issues unrelated to the action. None of the cites addressed the issue of the duty owed by a seller of residential real property. The Merceas' reply brief did address the issue of duty, and four (4) cases were cited along with reference to

the Idaho Real Property Disclosure Act (I.C. 55-2501 et seq.). It is difficult to fathom how Defendants' counsel spent so much time doing research that produced so little regarding the issues of this case.

5. The Merceas' memorandum in support of their Motion for Reconsideration was also only five (5) pages long, yet considerable research time was billed for the reply.

6. Although Plaintiff served discovery on the Merceas, no responses were served. The Merceas served a set of standard, boiler plate interrogatories and requests for production of documents. No depositions were taken in the action.

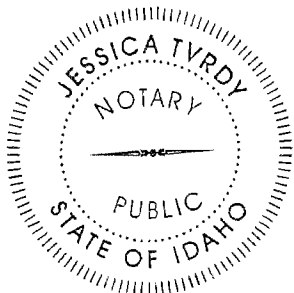
7. The Court granted the Merceas summary judgment, so no trial preparation occurred in this action. Yet Defendants' counsel seeks nearly \$34,000.00 in attorney fees and over \$2,000.00 in costs. The claimed attorney fees are clearly excessive and unreasonable and should be denied.

8. I have attached as Exhibit 1 to this affidavit a true and correct printout of the time I have devoted to this action. I offer the printout merely as evidence of the time Plaintiff's counsel has devoted to this action vis-a-vis the time claimed by Defendants' counsel.

DATED this 19th day of July, 2010.

John P. Whelan
John P. Whelan

Subscribed and sworn before me this 19th day of July, 2010.



[Signature]
Notary Public in and for the State of Idaho
Residing at: Post Falls
My Comm. Expires: 12/29/11

J.P. Whelan, P.C.
Attorney at Law
P.O. Box 2688
Coeur d' Alene, Idaho 83816
Telephone: (208) 664-5891
Fax: (208) 664-2240

July 19, 2010

Diana James
1111 Crestline Drive
Coeur d'Alene, ID 83815

Billing Statement for the period August 1, 2008 through May 25, 2010.

DATE	WORK PERFORMED	TIME DEVOTED
08/12/08	Met with Diana.	1.1
09/02/08	Returned Diana's call.	0.1
09/08/08	Returned Diana's call—left message.	N/C
09/10/08	Travel to site for inspection; met with Diana; notes to file.	1.8
09/18/08	Returned Diana's telephone call.	0.1
09/22/08	Read Diana's email regarding obituary of former owner of home next door; instructed paralegal regarding search for probate file.	0.2
09/26/08	Read paralegal's notes and court file regarding probate of Edmund Wyneken; email from Diana.	0.2
09/29/08	Telephone call from Diana regarding facts and what we know about ownership claims versus the home next door; reviewed probate documents again.	0.5
10/01/08	Telephone call from Diana regarding speaking to daughter of Edmund Wyneken.	0.3
10/07/08	Telephone call from Lori Kleinsmith.	0.4
10/13/08	Reviewed copies from file of Maria Wyneken; telephone call to Diana. Expense- cost of copying documents from Maria Wyneken court file= \$50.00	1.0 \$50.00

418

Exhibit
1

10/17/08	Reviewed file and purchase documents; prepared complaint against Diana's seller for non-disclosure; reviewed title documents and plat; notes to file.	1.5
10/20/08	Telephone call from Diana regarding status in detail; discussed options.	0.9
10/20/08	Traveled to Diana's house to review survey stakes.	0.7
10/21/08	Reviewed Diana's title policy and notes to see if coverage possible; began work on complaint; legal research regarding warranty of title; reviewed Lamphiear survey documents; reviewed deed to Lamphiear, from Lamphiear to Mercea.	2.3
10/22/08	Prepared draft complaint; considered legal theories; notes to file; more legal research regarding warranties of title and defrauding a "class" of people vs. single person; read the chain of title deeds regarding any restrictions.	4.6
10/28/08	Telephone call from Diana regarding her property tax appeal.	0.3
10/30/08	Telephone call from Diana regarding her tax problem; discussed neighbor.	0.3
11/03/08	File review in preparation of meeting with Diana; meeting with Diana. Expense- copy of court file Allen v. Busby= \$79.00	2.0 \$79.00
11/05/08	Telephone call from Diana regarding title company.	0.1
11/12/08	Telephone call from Diana regarding title company letter.	0.1
11/17/08	Telephone call from Diana; review of documents from Building Department; telephone call to Diana regarding setbacks vis-a-vis diagram.	1.2
11/18/08	Met with Diana regarding diagram; discussed need for survey.	0.3
12/03/08	Met briefly with Diana regarding status.	0.3
12/04/08	Telephone call from Diana regarding her neighbors.	0.1
12/12/08	Returned Diana's call; discussed easement permit.	0.4
12/15/08	Telephone call from Diana regarding her discussions with City over right of way.	0.2

12/30/08	Returned Diana's call.	0.2
02/04/09	Reviewed entire file; reviewed building permit file; reviewed First American Title survey; read three title policy exceptions and covered risks; read through purchase agreement, disclosure statement lot line adjustment; reviewed all deeds and easements in file; revised complaint.	2.5
02/05/09	Further revised complaint.	1.1
02/06/09	Expense- Court filing fee for complaint= \$88.00	\$88.00
02/12/09	Returned Diana's call and gave her a status report.	0.2
02/25/09	Arranged service of Defendants in Arizona; letter to Sheriff; Expense- Sheriff's service fee= \$100.00	0.2 \$100.00
03/16/09	Reviewed Sheriff's notes regarding service; research regarding location of Defendants.	0.2
03/18/09	Letter to Pima County sheriff regarding service. Expense: sheriff's service fee for serving Defendant's Mercea= \$100.00	0.1 \$100.00
03/27/09	Reviewed real estate purchase contract supplied by broker.	0.1
04/02/09	Telephone call from attorney for sellers.	0.1
04/03/09	Returned Diana's call.	0.2
04/13/09	Telephone call from attorney for Mercea.	0.3
04/13/09	Telephone call to Diana regarding site inspection.	0.1
04/14/09	Travel to site for inspection by attorney Anson; met with attorney Anson.	1.0
04/23/09	Expense- cost of attempted service on Lamphiears (unsuccessful)= \$70.00	\$70.00
04/28/09	Telephone call from seller's attorney; read answer and cross complaint.	0.3
04/29/09	Telephone call from Diana regarding status.	0.1
05/05/09	Telephone call from attorney for First American Title.	0.1
05/11/09	Returned Diana's call.	0.1

05/12/09	Prepared motion to publish summons and complaint; letter to Lamphiears.	0.7
05/13/09	Telephone call from attorney Ed Anson regarding our intent to go forward.	0.1
05/18/09	Telephone call from Sue Lamphiear.	0.1
05/19/09	Returned Diana's call.	0.3
05/20/09	Met with Diana regarding reporting to police.	0.1
05/21/09	Returned call of attorney for title company.	0.2
05/26/09	Telephone call from title company attorney regarding facts and issues.	0.6
05/28/09	Long telephone call from Diana regarding issue regarding property lines and when documents were received and reviewed.	0.7
05/29/09	Reviewed closing documents; telephone call to Diana; reviewed title policy; telephone call to Diana; notes to file.	0.5
06/15/09	Read answer of Lamphiear; email from attorney for title company; reviewed photos and title policy in detail; returned Diana's call.	0.5
06/23/09	Reviewed discovery; letter to Diana; began drafting discovery responses.	2.2
06/24/09	Reviewed answer of First American Title.	0.2
07/15/09	Met with Diana to go over discovery.	0.5
07/23/09	Returned Diana's call.	0.2
09/29/09	Telephone call from Diana regarding status.	0.2
10/05/09	Court appearance for status conference.	0.8
11/03/09	Returned Diana's call.	0.1
11/12/09	Telephone call to Diana regarding status.	0.1
11/18/09	Telephone call from Diana; telephone call to appraiser.	0.4
11/23/09	Talked to an appraiser regarding appraising subject property.	0.2

11/30/09	Read email from Elaine Johnson to Diana; produced a package of documents for our expert; worked on discovery.	1.1
12/01/09	Revised and finalized letter to appraiser; returned Diana's call; finalized discovery requests.	0.6
12/01/09	Pulled out pictures to include with letter to appraiser; returned Diana's call.	0.3
12/03/09	Worked on discovery to Mercea.	0.2
12/24/09	Talked at length with appraiser.	0.5
12/30/09	Returned Diana's call.	0.2
12/31/09	Spoke with appraiser; returned Diana's call regarding discovery.	0.1
01/05/10	Prepared for meeting; began drafting answers to requests for admissions; met with Diana to work up responses.	4.0
01/06/10	Reviewed Lamphiear's interrogatory responses and requests for production of document responses; letter to Lamphiears.	0.6
01/06/10	Arranged survey of property; met with Diana; telephone call from title company attorneys regarding issues.	2.5
01/07/10	Notes regarding documents needed by surveyor.	0.1
01/16/10	Returned Diana's call; read Mercea's motion for summary judgment.	1.3
01/18/10	Continued work on opposition to motion for summary judgment; drafted my affidavit; drafted Diana's affidavit; prepared motion for leave to file amended complaint; amended complaint.	1.6
01/20/10	Legal research regarding duty to disclose.	0.3
02/01/10	Returned Diana's call regarding Elaine's telephone call to her (from Lamphiears); briefly reviewed affidavit of Lamphiears.	0.4
02/03/10	Prepared expert witness disclosure; letter from surveyor; reviewed Mercea's reply to our opposition to motion for summary judgment.	0.5

02/04/10	Completed interrogatories and requests for production of documents.	2.2
02/04/10	Reviewed discovery responses from Lamphiear; telephone call to Diana regarding buying lot 1; had assessor run ownership of lot 3.	0.6
02/04/10	Prepared for hearing; hearing on Mercea's motion for summary judgment and our motion to amend.	3.3
02/04/10	Expense- blow up photographs of property for hearing on motion for summary judgment- \$59.98	\$59.98
02/05/10	Returned Diana's call.	0.2
02/17/10	Prepared opposition to Lamphiear motion for summary judgment; prepared opposition to First American Title motion for summary judgment; began legal research; telephone call to attorney for First American Title Insurance Company; telephone call to Diana; prepared motion to dismiss cause of action against Lamphiear.	4.0
02/19/10	Telephone call from attorney for First American.	0.3
02/19/10	Telephone call to Diana to discuss First American Title Insurance Company's dismissal offer; telephone call to attorney for First American Title Insurance Company.	0.4
02/19/10	Telephone call from Ed Anson, discussed ways of resolving case.	0.3
03/01/10	Telephone call from attorney Davis regarding First American Title Insurance Company.	0.2
03/02/10	Read stipulation; telephone call from attorney Olson; signed stipulation and reviewed judgment; fax letter to attorney.	0.3
03/03/10	Reviewed final stipulation and judgment.	0.1
03/08/10	Read proposed order; drafted objection.	0.2
03/09/10	Telephone call to Ed Anson regarding his cross-complaint and stipulation to placement of right of way.	0.2
03/10/10	Telephone call to Ed Anson to discuss need for expert regarding right of way location.	0.2

03/16/10	Revised complaint to add First American Title Company and clean up allegations; researched proper party for service.	2.0
03/17/10	Finalized amended complaint.	0.1
03/18/10	Read letter from Russ Honsaker regarding expert testimony; letter to Russ; telephone call to Diana regarding hiring surveyor; drafted expert witness disclosure.	1.0
03/18/10	Finalized interrogatories and request for production of documents to Mercea. Expense- fee of surveyor for document review= \$75.00	0.2 \$75.00
04/02/10	Read Lamphiears motion for summary judgment against Mercea.	0.3
04/08/10	Reviewed notes from motion for summary judgment hearing.	0.1
04/14/10	Telephone call to Ed Anson regarding agreeing to submit new order by stipulation; prepared motion for reconsideration/amend order; legal research on issue of Anson not serving copy of proposed order; drafted affidavit in support of motion.	2.0
04/19/10	Reviewed and revised motion for reconsideration and memorandum.	0.3
04/22/10	Expense- service of complaint on First American Title Company= \$35.00	\$35.00
04/22/10	Expense- Frame & Smetana charge for surveying property= \$587.50	\$587.50
04/26/10	Read Defendant's motion for reconsideration.	0.1
05/11/10	Reviewed letter and answer of Mercea and affirmative defenses; prepared and finalized motion to strike.	1.5
05/19/10	Reviewed opposition to our motion for reconsideration.	0.2
05/25/10	Court appearance on motion for reconsideration, motion to strike and Lamphiears' motion for summary judgment.	1.5

Total Attorney Time This Period: 72.7 Hours

Hourly Rate: (1.1 Hours @ \$175.00 per hour)
(71.6 Hours @ \$200.00 per hour)

Attorney Fees This Period: \$ 14,512.50

Expenses This Period \$ 1,244.48

Total Attorney Fees and Expenses This Period \$ 15,756.98

Amount of Last Statement \$ 0.00

Total: \$ 15,756.98

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Edward J. Anson
708 Northwest Blvd., Suite 401
Coeur d'Alene, ID 83814

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile to: 667-8470

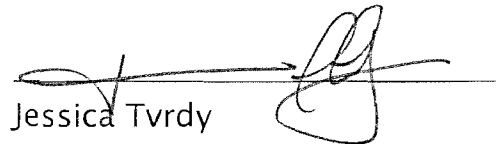
Joe Lamphiear and Susan Lamphiear
1021 Crestline Drive
Coeur d'Alene, ID 83814

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile to:

Douglas S. Marfice
Ramsden & Lyons, LLP
700 Northwest Blvd.
P.O. Box 1336
Coeur d'Alene, ID 83816-1336

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile to: 664-5884

Jessica Tvrdy



JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d' Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

STATE OF IDAHO
COUNTY OF KOOTENAI } ss
FILED

2010 JUL 20 PM 2: 00

CLERK DISTRICT COURT
CSusan Reed
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and
PATRICIA MERCEA, husband and
wife, JOE A. LAMPHEAR and
SUSAN M. LAMPHEAR, husband
and wife, FIRST AMERICAN TITLE
INSURANCE CO., FIRST
AMERICAN TITLE COMPANY,
INC.

Defendants.

CASE NO. CV-09-992

AFFIDAVIT OF DIANA JAMES IN SUPPORT
OF PLAINTIFFS' MOTION TO VACATE
JUDGMENT/RECONSIDERATION

Hearing Date: August 19, 2010

Time: 3:00 p.m.

Judge: John P. Luster

STATE OF IDAHO)

) ss.

County of Kootenai)

AFFIDAVIT OF DIANA JAMES IN SUPPORT OF PLAINTIFFS' MOTION TO VACATE
JUDGMENT/RECONSIDERATION- 1

I, Diana James, being first duly sworn, deposes and says:

1. I am the Plaintiff in the above-entitled action. I have personal knowledge of the following facts and could competently testify.

2. I bought the real property which is the subject of the above-entitled lawsuit from Cornelius Mercea and Patricia Mercea on April 2, 2008. I utilized the services of a real estate agent, Elaine Johnson, in the course of the transaction.

3. Cornelius Mercea and Patricia Mercea were the sellers in the transaction, and the sellers provided a written property disclosure to me.

4. At no time did Cornelius Mercea and Patricia Mercea, the sellers, ever disclose to me that a public right of way ran down the middle of the driveway to the home. If one looks at the home I bought from Defendants, nothing would place a reasonable person on notice that the driveway to the home was anything but a typical driveway. When, in fact, a fifteen foot public right of way runs down the middle of the driveway—and the driveway is an access for some undeveloped owned by the Defendants Lamphiear to the east of my home. This right of way runs literally fifteen feet from the front door of my home.

5. I would not have bought this home had the true facts been disclosed to me by my sellers Defendants Mercea. A visual inspection of the property would not, and did not, even suggest that the access for the undeveloped property to the east of the home was provided by the driveway of the home.

6. Although I was provided a plat by the escrow agent, along with some other papers, before the close of escrow on the home purchase, the plat

map illustrated that the undeveloped lot to the east of the residential home was too small to be developed (see attached plat map). The plat did not illustrate the position of the public right of way in relation to the home being sold by the Merceas. I learned only after the close of escrow that the Lamphiears had performed a lot line adjustment to the unbuildable lot to the east of the home—creating a buildable lot that was many times the size of the originally platted lot (lot 1 in the plat). The apparent access to “lot 1” was located several houses down from the home at issue and ran right next to the home owned by the Lamphiears.


7. Before the close of escrow I was provided an “overhead” photograph by the escrow agent handling the sale of the Merceas’ residential home. The photograph contained a plat overlay that placed the right of way in question in this lawsuit just north of the driveway leading to the home. A visual inspection of the home at issue reveals some overhead telephone lines in the same area where the public right of way was depicted in the photograph. Also, there is a strip of dirt next to the driveway to the home that seemingly, at least in my mind, confirmed that the public right of way was located on the dirt strip next to the driveway to the residential home. Also, a large rock outcropping on this strip of dirt effectively made the dirt strip impassable. Neither my visual inspection of the home nor the plat map and photograph of the home revealed to me that the public right of way ran down the middle of the driveway leading to the home.

8. I was aware that an adjacent *developed lot with a home* located to the west of the property *may* have used the driveway leading to the home as an occasional access to a carport the owner had built. But that lot (lot 3) also had a paved driveway leading to the home. Accordingly, the carport on the lot to the

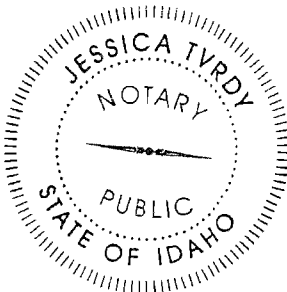
west of the subject home did not place me on notice that the driveway to the home was, in reality, a public right of way. Had I known that the driveway was a public right of way, I would not have purchased the home from the Merceas.

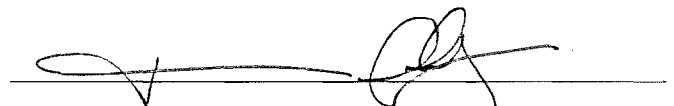
9. I have attached as Exhibit 1 a copy of the plat map supplied to me by the escrow agent before the close of escrow. Please note the lot described on the plat as "lot 1", the unbuildable undeveloped lot to the west of the home at issue. Attached as Exhibit 2 is a plat map I obtained after the close of escrow illustrating that the Lamphiears did a lot line adjustment to make the "lot 1" a buildable lot. Lastly, I have attached as Exhibit 3 a color copy of the overhead photograph of the subject home with the plat overlay showing that the public right of way was located *next* to the driveway at issue in an area where a strip of dirt lies under some overhead telephone wires.

Dated: 7/19/10

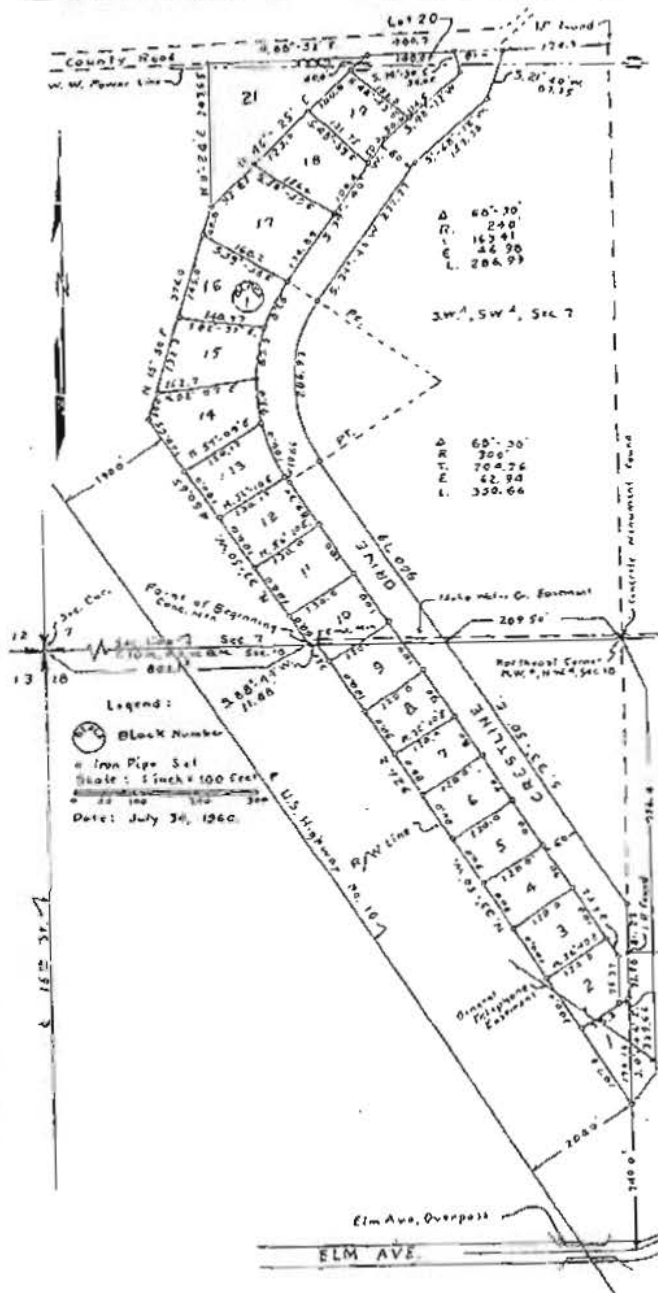

Diana James

Subscribed and sworn before me this 19 day of July, 2010.




Notary Public in and for the State of Idaho
Residing at: Post Falls
My Comm. Expires: 12/29/11

CHERRY HEIGHTS



OWNERS CERTIFICATES

BE IT KNOWN that we, the undersigned, are owners of the land described in the SURVEYORS CERTIFICATE and have caused the same to be subdivided into lots and thereupon as herein plotted, and do designate the same as CHERRY HEIGHTS.

Lot 2
 Constance and LaRae Gissell, husband and wife, 1st
 Contract Purchasers, and Myron Haugen and Ellen H. Haugen, husband and wife, the owners.
 The miles and bounds description of Lot 2 as follows: Beginning at the section corner at the junction of 15th Street and Harrison Avenue; thence easterly along the section line between sections 7 and 10, T.30N., R.3W., D.M., a distance of 614.0 feet, more or less, to a concrete monument on the east side of U.S. Highway No. 10; thence S. 33° 30' E., 403.6 feet to the northeast corner of Lot 9, the True Point of Beginning; thence S. 33° 30' E., 70.0 feet; thence S. 36° 10' E., 120.0 feet; thence S. 33° 30' W., 99.0 feet to the True Point of Beginning.

Lot 4
 Hugh Morgan and Irene Morgan, husband and wife, the Contract Purchasers, and Myron H. Haugen and Ellen H. Haugen, husband and wife, the owners.
 The miles and bounds description of Lot 4 as follows: Beginning at the section corner at the junction of 15th Street and Harrison Avenue; thence easterly along the section line between sections 7 and 10, T.30N., R.3W., D.M., a distance of 614.0 feet, more or less, to a concrete monument on the east side of U.S. Highway No. 10; thence S. 33° 30' E., 403.6 feet to the northeast corner of Lot 9, the True Point of Beginning; thence S. 33° 30' E., 70.0 feet; thence S. 36° 10' E., 120.0 feet; thence S. 33° 30' W., 99.0 feet to the True Point of Beginning.

Lot 6
 Roy F. Carlson and Mary B. Carlson, husband and wife, the Contract Purchasers, and the First Federal Savings and Loan Association of Coeur d'Alene, Idaho, the owners.
 The miles and bounds description of Lot 6 as follows: Beginning at the section corner at the junction of 15th Street and Harrison Avenue; thence easterly along the section line between sections 7 and 10, T.30N., R.3W., D.M., a distance of 614.0 feet, more or less, to a concrete monument on the east side of U.S. Highway No. 10; thence S. 33° 30' E., 403.6 feet to the northeast corner of Lot 9, the True Point of Beginning; thence S. 33° 30' E., 70.0 feet; thence S. 36° 10' E., 120.0 feet; thence S. 33° 30' W., 99.0 feet to the True Point of Beginning.

Lot 7
 Owners are Hugh Morgan and Irene Morgan, husband and wife, the Contract Purchasers, and Myron H. Haugen and Ellen H. Haugen, husband and wife, the owners.
 The miles and bounds description of Lot 7 as follows: Beginning at the section corner at the junction of 15th Street and Harrison Avenue; thence easterly along the section line between sections 7 and 10, T.30N., R.3W., D.M., a distance of 614.0 feet, more or less, to a concrete monument on the east side of U.S. Highway No. 10; thence S. 33° 30' E., 403.6 feet to the northeast corner of Lot 9, the True Point of Beginning; thence S. 33° 30' E., 70.0 feet; thence S. 36° 10' E., 120.0 feet; thence S. 33° 30' W., 99.0 feet to the True Point of Beginning.

Lot 8
 Owners are M.B. Coleman and Pearl E. Coleman, husband and wife, the Contract Purchasers, and the First Federal Savings and Loan Association of Coeur d'Alene, Idaho, the owners.
 The miles and bounds description of Lot 8 as follows: Beginning at the section corner at the junction of 15th Street and Harrison Avenue; thence easterly along the section line between sections 7 and 10, T.30N., R.3W., D.M., a distance of 614.0 feet, more or less, to a concrete monument on the east side of U.S. Highway No. 10; thence S. 33° 30' E., 403.6 feet to the northeast corner of Lot 9, the True Point of Beginning; thence S. 33° 30' E., 70.0 feet; thence S. 36° 10' E., 120.0 feet; thence S. 33° 30' W., 99.0 feet to the True Point of Beginning.

Lot 16
 Owners are M.B. Coleman and Pearl E. Coleman, husband and wife, the Contract Purchasers, and the First Federal Savings and Loan Association of Coeur d'Alene, Idaho, the owners.
 The miles and bounds description of Lot 16 as follows: Beginning at the section corner at the junction of 15th Street and Harrison Avenue; thence easterly along the section line between sections 7 and 10, T.30N., R.3W., D.M., a distance of 614.0 feet, more or less, to a concrete monument on the east side of U.S. Highway No. 10; thence S. 33° 30' E., 403.6 feet to the northeast corner of Lot 9, the True Point of Beginning; thence S. 33° 30' E., 70.0 feet; thence S. 36° 10' E., 120.0 feet; thence S. 33° 30' W., 99.0 feet to the True Point of Beginning.

STATE OF IDAHO SS.

County of Kootenai
 On this 26th day of September, 1960, before me a Notary Public in and for said State, personally appeared Myron H. Haugen and Ellen H. Haugen, known to me to be the owners of the land described in the Surveyors Certificate, and acknowledged to me that such information recited in the said certificate was true and correct.

SURVEYORS CERTIFICATE

I, Hugh F. Leach, Licensed Land Surveyor in and for the State of Idaho, do hereby certify that on June 1960, I surveyed the land herein described under the direction of the owners, as shown on the plat attached hereto, and that the same is in accordance with the Surveyors Certificate and the plat attached hereto, and that the same is in accordance with the Surveyors Certificate and the plat attached hereto, and that the same is in accordance with the Surveyors Certificate and the plat attached hereto.

STATE OF IDAHO SS.

County of Kootenai
 On this 26th day of August 1960 before me personally appeared Hugh F. Leach, Licensed Land Surveyor in and for the State of Idaho, and he acknowledged to me that he is the owner of the land described in the Surveyors Certificate and the plat attached hereto, and that the same is in accordance with the Surveyors Certificate and the plat attached hereto.

COUNTY SURVEYORS CERTIFICATE

I, Roy H. Kingston, County Surveyor in and for the County of Kootenai, State of Idaho, do hereby certify that this plat is in accordance with the Surveyors Certificate and the plat attached hereto, and that the same is in accordance with the Surveyors Certificate and the plat attached hereto.

CITY COUNCIL APPROVAL

This plat was approved by the City Council of Coeur d'Alene, Idaho, on the 26th day of August 1960.

COUNTY COMMISSIONERS APPROVAL

This plat was approved and adopted by the County Commissioners of Kootenai County, State of Idaho, on the 26th day of August 1960.

COUNTY TREASURER

I, hereby certify that this plat was filed for record in the office of the County Treasurer, State of Idaho, on the 26th day of August 1960.

COUNTY HEALTH OFFICER

I, hereby certify that this plat was filed for record in the office of the Health Officer of Kootenai County, Idaho, on the 26th day of August 1960.

COUNTY RECORDER

I, hereby certify that this plat was filed for record in the office of the Recorder of Kootenai County, Idaho, on the 26th day of August 1960.

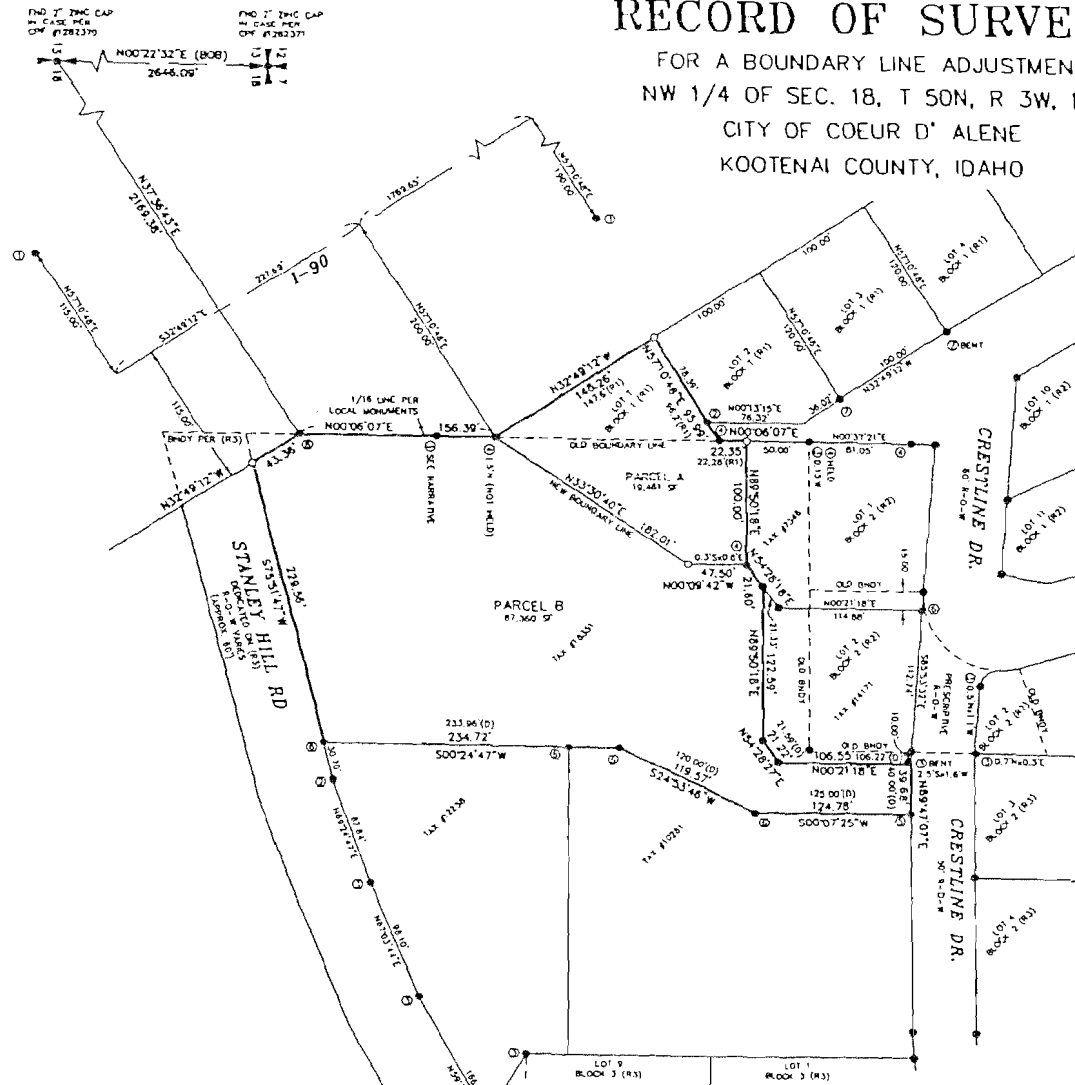
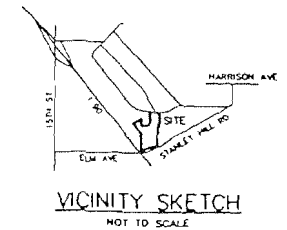
STATE OF IDAHO SS.

County of Kootenai
 On this 26th day of October 1960, before me appeared Myron H. Haugen and Ellen H. Haugen, husband and wife, known to me to be the owners of the land described in the Surveyors Certificate, and they acknowledged to me that such information recited in the said certificate was true and correct.

RECORD OF SURVEY

FOR A BOUNDARY LINE ADJUSTMENT
NW 1/4 OF SEC. 18, T 50N, R 3W, BM
CITY OF COEUR D'ALENE
KOOTENAI COUNTY, IDAHO

BOOK 24 PAGE 492
INST # 208792300V



SURVEYOR'S NARRATIVE:

HIGHWAY MONUMENT:
I FOUND AN ITD MONUMENT ON THE WEST LINE OF THIS PLAT 0.2 FEET WEST OF THE 1/16 LINE AS USED HEREON AND 174.7 FEET FROM THE CENTERLINE OF 1-90. NO MONUMENT WAS CALLED FOR AT THIS LOCATION BUT THERE WAS A MONUMENT CALLED FOR 200' FROM THE CENTERLINE AND ON THE 1/16 LINE (NOT FOUND). IT APPEARS THAT THIS MONUMENT WAS SET AT THE WRONG LOCATION. I DID NOT HOLD IT TO ESTABLISH THE 1-90 R-O-W.

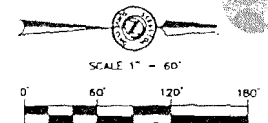
BOUNDARY:
THE PARCELS WITHIN THIS PLAT ARE ENCLOSED BY THE PLATS OF CHERRY HEIGHTS, CHERRY HEIGHTS 1ST ADDITION AND STANLEY HILL TERRACE ADDITION. WITHIN THESE PLATS AND THE DEEDS THAT ENCOMPASS THE PARCELS BETWEEN THEM THERE IS UP TO SEVERAL FEET OF CLOSURE ERRORS. WHERE POSSIBLE, I HELD THE LOCAL MONUMENTATION AS THE BEST EVIDENCE OF THE BOUNDARY FOR THIS PLAT.

RECORDS REVIEWED:

- (R1) PLAT OF CHERRY HEIGHTS BY LOCKRIDGE IN 1964 BK E PG 9
- (R2) PLAT OF CHERRY HEIGHTS FIRST ADDITION BY LOCKRIDGE IN 1965 BK E PG 13
- (R3) PLAT OF STANLEY HILL TERRACE ADDITION BY FRAME IN 1968 BK E PG 65
- (R4) PLAT OF TWO SUBDIVISION BY CHEELEY IN 1977 BK F PG 2
- (R5) PLAT OF LEE'S LAKE ADDITION BY HOWE IN 1998 BK J PG 16
- (R6) PLAT OF ERIKSON'S LOTS BY DAHLMAN IN 2005 BK J PG 242
- (R7) TITLE COMMITMENT #6832 BY STEWART TITLE DATED 4 MAY 2006

LEGEND

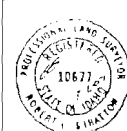
- - FOUND AS INDICATED
- - FOUND ITD BE IN CONC
- ① - FOUND 1/2" IP
- ② - FOUND 3/4" IP
- ③ - FOUND 1" IP
- ④ - FOUND 4" SQ CONC MON
- ⑤ - FOUND 1/2" REBAR
- ⑥ - FOUND 5/8" REBAR
- ⑦ - FOUND ITD BROKEN CONC MON
- ⑧ - SET 5/8"X30" REBAR W/ STRATTON 10677 CAP
- ⑨ - SEARCHED FOR - NOT FOUND OR SET
- ⑩ - BASIS OF BEARINGS
- (1) - MEASUREMENT PER DEED



BASIS OF BEARINGS
GRID NORTH PER COUNTY
COORDINATES FOR WEST SECTION LINE
EQUIPMENT USED
RTK GPS
3" TOTAL STATION

SURVEYOR'S CERTIFICATE:

I, ROBERT L. STRATTON, PROFESSIONAL LAND SURVEYOR #10677 OF THE STATE OF IDAHO, HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT SURVEY MADE UNDER MY DIRECT SUPERVISION IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO.



SURVEY FOR
LAMPHIEAR

INDEX			
1/4, 1/4	SEC	T.	R.
	18	50N	3W

RECORDING CERTIFICATE	
COUNTY OF KOOTENAI STATE OF IDAHO FILED FOR RECORD THIS <u>14th</u> DAY OF <u>MARCH</u> , 2009 BY <u>18</u> HOURS PAST <u>9</u> A.M. AND RECORDED IN BOOK <u>24</u> OF SURVEYS PAGE <u>492</u> AT THE REQUEST OF ROBERT STRATTON, KOOTENAI COUNTY SURVEYOR.	DATE OF SURVEY <u>2/24/2009</u> BY <u>XC</u> FILE

STRATTON SURVEYING & MAPPING	
3716RSALDING	DATE: 3/1/07
DATE: 3/1/07	SHT. 1 OF 2
JOE # 3716	

Exhibit

2

472



First National Title Company
1800 N. Lakewood Drive
Bozeman, Montana 59714
Phone: 253-651-0800
Fax: 253-651-0800

Exhibit
3

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Edward J. Anson
708 Northwest Blvd., Suite 401
Coeur d'Alene, ID 83814

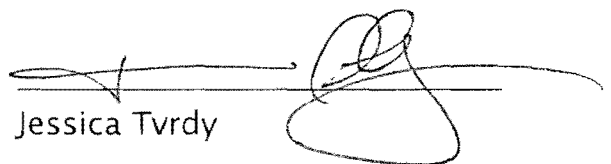
- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile to: 667-8470

Joe Lamphiear and Susan Lamphiear
1021 Crestline Drive
Coeur d'Alene, ID 83814

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Ramsden & Lyons, LLP
700 Northwest Blvd.
P.O. Box 1336
Coeur d'Alene, ID 83816-1336

- ☒ U.S. Mail, Postage Prepaid
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☒ Facsimile to: 664-5884


Jessica Tvrdy

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d' Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 JUL 20 PM 2:00

CLERK DISTRICT COURT
Cham Reed
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife,
FIRST AMERICAN TITLE INSURANCE
CO., FIRST AMERICAN TITLE
COMPANY, INC.

Defendants.

CASE NO. CV-09-992

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION TO VACATE
JUDGMENT/RECONSIDERATION

Hearing Date: August 19, 2010

Time: 3:00 p.m.

Judge: John P. Luster

Plaintiff, Diana James, submits the following memorandum in
support of Plaintiff's motion to vacate/amend judgment:

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO VACATE JUDGMENT/RECONSIDERATION-

STATEMENT OF CASE

Defendants, Cornelius Mercea and Patricia Mercea, filed their motion for summary judgment in this real estate purchase action on December 11, 2009. The motion was very non-specific as to what the Defendants were attempting to establish by way of their motion for summary judgment. Some further detail was provided in Defendants' "reply" brief. At the hearing on the motion, the Court made comments about some of the issues germane to the case, including the remedies provided by I.C. 55-2501 et seq. (the Real Property Disclosure Act). However, the Court denied Defendants Mercea summary judgment on the issue of whether or not Defendants had a duty to disclose relevant facts about the "public right of way" at issue in the case. The Court found that a duty to disclose did exist.

Defendants apparently submitted a proposed order to the Court nearly sixty (60) days after the hearing. Plaintiff's counsel was not supplied a copy of the proposed order when it was submitted to the Court. Plaintiff's counsel first saw the proposed order only after the Court had signed and filed the order. The order was objectionable because it included "findings of fact" and "conclusions of law" outside of the findings made by the Court. Including particularly the "conclusion" that the remedy of rescission is not available to the Plaintiff. Plaintiff therefore filed a motion for reconsideration. The Defendants Merceas

also filed a motion for reconsideration requesting that the Court reverse its finding that a duty existed.

The memorandum filed in support of the Merceas' motion for reconsideration addresses the issue of the "duty to disclose". Defendants urged the Court to accept the notion that the existence of a duty is a matter of law instead of a factual determination to be determined by a jury. The Merceas' memorandum also characterized the duty to disclose in a real estate action as some form of fiduciary duty—which it is not—although a fiduciary duty *may* give rise to a duty to disclose.

Nevertheless, the Court reversed itself and declared that no duty to disclose existed *under the facts of this case*. The Court essentially invaded the realm of the jury by so ruling. The Merceas were granted summary judgment and the Court denied Plaintiff her jury trial.

WHAT PLAINTIFF SEEKS

Plaintiff, Diana James, requests that the Court reconsider and deny summary judgment to the Merceas on the issue of the duty to disclose. Plaintiff should have the right to present her case to a jury in light of the fact that the Court first found a duty to disclose and then reversed itself when presented with the Merceas' motion for reconsideration. This fact alone demonstrates that a triable issue of law and fact exists in this action by virtue of the seemingly

inconsistent rulings by the Court and the reference by the Court to fiduciary duty standards.

THE COURT'S DECISION

The Court's recitation of the underlying facts in this action is essentially correct. However, certain important facts may have been overlooked, including the responses of the Merceas to the "sellers Property Disclosure Form" attached to the Affidavit of Diana James filed in opposition to the original motion for summary judgment of the Defendants Mercea.

I.R.C.P. RULE 60(b) MOTIONS

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

In the matter at hand, Plaintiff urges the Court to vacate the judgment entered on the ground of I.R.C.P. Rule 60(b)(6). In essence, Plaintiff requests that the Court reconsider (in accordance with I.R.C.P. Rule 11(a)(2)B and Rule 60(b)(6)) its decision and deny Defendants summary judgment. The specific ground relied upon by Plaintiff is that Plaintiff has demonstrated a triable issue of law or fact by virtue of the two diametrically opposed findings made by the Court—the Court first found a duty to disclose in the initial motion for summary judgment but the Court reversed itself on Defendants' motion for reconsideration and found that no duty to disclose existed *under the facts of this case*.

STANDARD FOR SUMMARY JUDGMENT

Rule 56 of the Idaho Rules of Civil Procedure provides for summary judgment where there is no triable issue of law or fact. As the Court stated in its' Decision filed June 25, 2010:

"If the record contains conflicting inferences or if reasonable minds might reach different conclusions, a summary judgment must be denied" (pg. 5 of Decision)(Citation omitted).

THE BETHLAHMY CASE

The case of *Bethlahmy v. Bechtel*, 91 Idaho 55, 415 P.2d 698 (1966) was cited by Plaintiff in her opposition to Defendants' motion for summary judgment. In the Court's Decision of June 25, 2010, the Court made reference to

the *Bethlahmy* case, and the Court correctly identified the standards for constructive fraud established by the case.

The salient issue before the Court in the instant action was whether the Defendants Merceas had a duty to disclose the fact that a public right of way ran down the middle of the driveway leading to the subject home.

In *Bethlahmy*, the Idaho Supreme Court made reference to *Janinda v. Lanning*, 87 Idaho 91 (1964) holding where the Court discussed the maxim of *Caveat Emptor*. The Court stated:

“[t]he ancient doctrine [caveat emptor] in its strict application is no longer in harmony with modern concepts of justice and that the Courts have drawn away from the doctrine in favor of a rule which would impose on the parties to the transaction a duty to speak whenever justice, equity and fair dealing demand it.”
(*Bethlahmy*, pg. 63)

The Court went on to quote the Restatement of Contracts, §472, Comment b (1932) as follows:

“if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party knowing the fact also knows that the other does not know it, non-disclosure is not privileged and is fraudulent.” (87 Idaho at 96, 390 P.2d at 829).

“The Janinda case differs from this in that there the buyer, having been put on warning, inquired of the vendor’s agent as to the purity of the water supply.

Here the buyer had no warning notice or knowledge of the defective condition of the premises and therefore made no inquiry of the seller or his agent. Nonetheless, the foregoing rule from the Restatement of Contracts would be applicable in this case.” (Id.).

The Supreme Court of Idaho ratified the *Bethlahmy* holding in its decision in *Sowards v. Rathbun*, 134 Idaho 702, 8 P.3d 1245 (2000).

KNOWLEDGE BY THE MERCEAS OF JAMES’ LACK OF KNOWLEDGE

In the Court’s Decision of June 25, 2010, the Court made reference to the elements of constructive fraud. One of those elements requires that the nondisclosing party (here the Merceas) have knowledge of a material fact that is vital between the parties and knowledge that the other party is unaware of the fact. *County Cove Development, Inc. v. May*, 143 Idaho 595, 150 P.3d 288 (2006).

In applying this standard, the Court properly inferred that the Merceas were aware of the location of the public right of way. Yet the Court concluded as follows:

“There is no legal duty present in this case imposed upon the Merceas to disclose information to James to dispel an assumption expressly contrary to the information provided and available.”

EXISTENCE OF PUBLIC RIGHT OF WAY NOT THE ISSUE

In its decision, the Court correctly concluded that the Plaintiff was aware of a public right of way in close proximity to the subject property before closing on the purchase. Diana James does not dispute that she was aware of a public right of way. However, Ms. James was supplied a photograph by her escrow officer that included a plat overlay (see Affidavit of Diana James in support of this motion) that placed the public right of way north of the driveway to the subject residential home. Accordingly, Ms. James did not *assume* that the public right of way was not located on the driveway of the property. She was supplied information by the parties' escrow agent that affirmatively placed the right of way north of the driveway to the residence. This fact mitigates against the claim of the Merceas that Diana James is somehow responsible for her own losses due to erroneous assumptions of her part.

THE SALIENT ISSUE IS THE LOCATION OF THE RIGHT OF WAY AND NOT THE EXISTENCE OF THE RIGHT OF WAY

The true issue involved in this case enters around the Merceas duty to disclose. The Merceas *knew* that the right of way ran down the center of the driveway to the home. Yet they failed to disclose that highly relevant fact to Plaintiff, who was unaware of the fact that the public right of way ran down the middle of the driveway. Under the Property Condition Disclosure Act (I.C. 55-2501 et seq.), a seller is *required* to disclose relevant facts regarding a

residential home. This has been the law in the State of Idaho since 1994. The legislature has made it abundantly clear that *caveat emptor* is no longer the rule in Idaho when a residential home is involved. Disclosure is the rule and the Merceas violated that rule of law in selling their residential home to Plaintiff. Specifically, I.C. 55-2508 requires a seller of residential real property to provide a response to the following question:

“9. Any other problems, including legal, physical or other not listed above that you know concerning the property? (emphasis added).

The Merceas did not provide a response to this question (which is found at the end of all the questions on page 3 of the Seller's Property Disclosure Form (see Affidavit of Diana James in Opposition to Defendants' Motion for Summary Judgment).

Additionally, mandated disclosure “6” (of the Act) asks the following of the Seller”:

“6. Describe any conditions that may affect your ability to clear title (such as encroachments, easements, zoning violations, lot line disputes, etc.).”

To this question the Mercea's answered "No". (Id.).

Clearly the Merceas were on notice that a disclosure of the public right of way was in order to satisfy the statutory disclosures. They disclosed nothing regarding this highly relevant, and vital, fact (see Seller's Property Disclosure Form attached to the Affidavit of Diana James in opposition to Defendants Merceas' motion for summary judgment)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO VACATE JUDGMENT/RECONSIDERATION-

The Merceas were obligated to disclose the fact that the public right of way ran down the middle of the driveway to the residential home—therefore a duty to disclose existed.

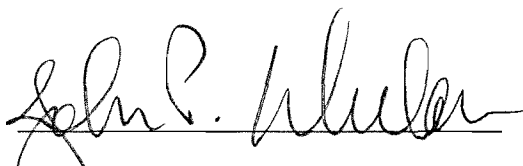
The *Bethlahmy* case and the case of *Sowards v. Rathbun*, 134 Idaho 702, 8 P.3d 1245 (2000) are seemingly directly on point with the case at hand.

CONCLUSION

A triable issue of law or fact exists in the present case and Plaintiff should not be denied the right to a jury trial. The Court's initial finding that a duty did exist should be reinstated and the Mercea Defendants should be denied summary judgment on this issue. Plaintiff would argue that the existence of a triable issue of law or fact is demonstrated by virtue of the ruling of the Court in finding initially that a duty to disclose did exist, yet that finding was reversed on Defendants' motion for reconsideration. The Property Disclosure Act and the case law also supports Plaintiff's position.

DATED this 19th day of July, 2010.

JOHN P. WHELAN, P.C.

By: 
John P. Whelan

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Edward J. Anson
708 Northwest Blvd., Suite 401
Coeur d'Alene, ID 83814

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
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☒ Facsimile to: 667-8470

Joe Lamphiear and Susan Lamphiear
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Coeur d'Alene, ID 83816-1336

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Jessica Tvrdy



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ISB# 6083

STATE OF IDAHO }
COUNTY OF KOOTENAI } ss
FILED:

2010 JUL 20 PM 2:00

CLERK DISTRICT COURT
Clara Reed
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife, FIRST
AMERICAN TITLE INSURANCE CO.,

Defendants.

CASE NO. CV-09-992

MEMORANDUM IN SUPPORT OF
OF PLAINTIFF'S OBJECTIONS TO
MEMORANDUM OF COSTS AND
ATTORNEY FEES AND MOTION
TO DISALLOW COSTS

Hearing date: August 19, 2010

Time: 3:00 p.m.

Judge: John P. Luster

Im accordance with I.R.C.P. Rule 54(d)(6), Plaintiff, Diana James, by and through her attorney of record, John P. Whelan, objects to the memorandum of costs and attorney fees and moves that such costs be disallowed in whole or part for the reasons that follow:

INTRODUCTION

Plaintiff, Diana James, filed her action against Defendants, Cornelius Mercea and Patricia Mercea, alleging that the Merceas did not disclose relevant information about a residential home sold by the Merceas to Plaintiff. Specifically, Plaintiff alleged the Merceas failed to disclose that a public right of way ran across the driveway that leads to the home purchased by Plaintiff.

The Court initially found that a duty to disclose did exist, but the Court reversed itself on the Defendants' motion for reconsideration.

Defendants filed a memorandum of costs claiming nearly \$36,000.00 in attorney fees and costs in an action that was decided on summary judgment. Plaintiff objects to the request for attorney fees and costs as grossly excessive and patently unreasonable.

DISCOVERY IN ACTION

Plaintiff served a set of standard interrogatories on Defendants Mercea, together with a request for production of documents. In total, the Merceas were requested to respond to only sixteen (16) interrogatories and fourteen (14) requests for production of documents. The Merceas never responded to Plaintiffs' discovery.

The Merceas also submitted discovery to Plaintiff. The discovery included eight (8) interrogatories, twenty-one (21) requests for admissions, and eight (8)

requests for production of documents to Plaintiff, to which Plaintiff duly responded.

No depositions have been taken in the action.

PROCEDURE IN ACTION

The Merceas' counsel appeared at only three (3) court appearances in this action—at two (2) motions for summary judgment and a motion for reconsideration. Yet Defendants' claim to have incurred nearly \$36,000.00 in attorney fees and costs. The request for fees and costs is patently unreasonable.

COMPARISON TO PLAINTIFF'S COUNSEL'S ATTORNEY FEES

Since the first consultation with Plaintiff, Diana James, Plaintiff's counsel, John P. Whelan, has devoted a mere \$15,756.98 in attorney fees and costs to this action(see affidavit of John P. Whelan). The attorney fees alone total only \$14,512.50, and Plaintiff bears the burden of proof! A comparison of the attorney fees incurred by Plaintiff to the attorney fees claimed by Defendants Mercea reveals a gross disparity in the fees charged. The only reasonable inference to draw is that Defendants are claiming fees that were not, or should not have been, incurred.

COSTS CLAIMED

1. Defendants claim \$2,350.00 was paid to expert witness Morse & Co. for work performed. Mr. Morse did not appear at any deposition or at any trial. This fee is excessive and patently unreasonable. Additionally, I.R.C.P. Rule 54(d)(1)(C)"8" limits expert witness fees to \$2,000.00 "for all appearances" for experts who appear at trial or at depositions. Defendants have failed to demonstrate why a fee over \$2,000.00 would be appropriate, and no documentary evidence has been offered in support of this claimed cost.

2. Defendants claim \$497.83 for computer assisted research. The amount claimed is excessive and patently unreasonable and devoid of any documentation in support of the claimed cost.

ATTORNEY FEES CLAIMED

1. Defendants seek to recover \$3,053.00 for work performed by attorney Kimberly A. Kamel. Ms. Kamel has been licensed in the State of Idaho since 2004 and her claimed hourly rate of \$215.00 is unreasonable and excessive for an attorney of limited experience.

2. Defendants also seek to recover attorney fees at the rate of \$240.00 per hour for attorney Edward Anson. The claimed hourly rate is excessive and patently unreasonable, and no client billing or retainer agreement supporting this hourly rate has been produced.

SPECIFIC TIMESHEET ENTRIES

1. Defendants' attorney claims 1.6 hours for traveling to and from the subject property for viewing and photographing. The time claimed is excessive and patently unreasonable. Plaintiff's attorney was with Mr. Anson the entire time and he billed for only one hour, the actual time spent at the site and the travel back and forth. Plaintiff's attorney is located in an office less than three minutes from attorney Anson's office. Paying Mr. Anson \$240.00 per hour to snap photographs seems to be clearly excessive.

2. Between April 14, 2009 and April 23, 2009, Defendants' attorney claims a total of 8.4 hours for preparing, reviewing and finalizing Defendant's answer and cross claim and doing research. The time claimed is excessive and patently unreasonable. The answer contained denials of most of the allegations and the cross claim was nothing more than boilerplate allegations.

3. Defendants' attorney claims a total of 3.2 hours preparing standard discovery requests and drafting a letter to the client. The time claimed is excessive and patently unreasonable.

4. Defendants' attorney claims a total of 6.0 hours was spent on researching summary judgment issues alone. Defendants attorney also claims additional time was spent on researching summary judgment issues. However, that time is combined with time spent on other things as well. The time claimed is excessive and patently unreasonable.

5. Defendants' attorney claims a total of 37.4 hours for research and preparing summary judgment paperwork on top of the alleged six hours of research. The time claimed is excessive and patently unreasonable. The Court's attention is invited to Defendant Merceas' original motion for summary judgment which cited only a minimal number of cases on the issue of dedicated easements.

6. Defendants' attorney claims a total of 9.4 hours to reply to the opposition of Plaintiff to Defendant's motion for summary judgment. The time claimed is excessive and patently unreasonable.

7. Defendants' attorney claims 0.2 hours on February 24, 2010 for reviewing the file, telephone conference with Whelan. Plaintiffs' attorney has no record of a telephone conference with Defendants' attorney on or around February 24, 2010, indicating that the call either did not take place or, if the call occurred, it was so short that it was not billed.

8. Defendants' attorney claims 0.3 hours on March 4, 2010 for reviewing the file, telephone conference with Whelan. Plaintiffs' attorney has no record of a telephone conference with Defendants' attorney on or around March 4, 2010.

9. Between March 10, 2010 and March 17, 2010, Defendants' attorney claims a total of 6.0 hours for research, drafting an order, a phone conference with the client and draft correspondence to the client. The time claimed is excessive and patently unreasonable as a large portion of the time was spent on

research and preparing the order. The order created also took substantial liberties with the actual holding of the Court.

10. Defendants' attorney claims a total of 28.9 hours on research and motion for reconsideration paperwork. The time claimed is excessive and patently unreasonable. Plaintiff would invite the Court's attention to the simple motion for reconsideration filed by Defendants.

11. Defendants' attorney claims a total of 0.5 hours for phone conferences with the court reporter. The time claimed is excessive and patently unreasonable, and no indication is given for the need for the phone calls.

12. Defendants' counsel repeatedly charged for "research" without providing any hint of what was researched in the way of issues.

13. On April 23, 2009 Defendants' counsel claims that it took 1.3 hours to "finalize" (sign) the answer and cross claim and draft correspondence to Plaintiff's counsel.

14. On June 10, 2010 to June 18, 2010, Defendants' counsel claims 3.2 hours for preparing standard, boilerplate interrogatories and requests for production of documents.

15. Between October 1, 2009 and November 6, 2009, Defendants' counsel claims 8.3 hours researching "summary judgment issues"—yet only a few citations are found in Defendants' motion for summary judgment.

16. On November 5, 2009, Defendants' counsel spent 2.3 hours preparing two simple affidavits in support of the motion for summary judgment.

17. On November 30, 2009 and December 7, 2010 [sic] Defendants' counsel devotes another 9.8 hours of "research regarding summary judgment issues".

18. On December 8, 2009 and December 9, 2009, Defendants' counsel devotes another 9.5 hours to a simple and straight forward summary judgment motion that does not even state why summary judgment would be appropriate. He then billed 2.3 hours to "finalize" the paperwork and to prepare a four sentence letter to the Court regarding courtesy copies.

19. Between January 22, 2010 and January 27, 2010, Defendants' counsel bills 9.4 hours for the preparation of Defendants' "reply" papers. In total, Defendants' counsel billed nearly 40 hours to prepare a simple motion for summary judgment supported by brief affidavits, together with a reply brief. The hours claimed are clearly excessive, unreasonable and unsupported by any specific entries on Defendants' counsel's time sheets.

20. Between March 10, 2010 and March 17, 2010, Defendants' counsel billed 6.0 hours to prepare the order on the initial motion for summary judgment.

21. On April 9, 2010, attorney "KAK" "reviews" the pleading and performs additional "research" on the issues of "duty", "latent and patent defect"—all after attorney Anson had already billed for dozens of hours of summary judgment research. After attorney "KAK" performs research attorney

Anson bills *an additional* 3.0 hours for his “research”—for a total of 6.3 hours of research after Defendants’ reply brief had been filed. Nevertheless, the “research continues”.

22. Between April 15, 2010 and April 27, 2010, another 28.9 hours is spent doing “research” in support of a simple motion for reconsideration. On May 5, 2010 another 5.8 hours is billed by attorney Anson drafting, re-drafting and researching summary judgment issues.

CONCLUSION

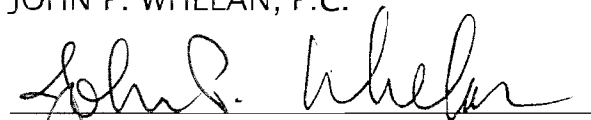
In total, the attorney fees claimed are outrageous, and grossly inflated in an action where the sole work product of Defendants’ counsel took the form of a simple motion for summary judgment, a reply brief and a simple motion for reconsideration supported by simple affidavits. Defendants should be denied fees on the basis that the fees claimed are so outrageous and unreasonable that the fees must be denied entirely.

Lastly, Defendants have stated no basis for an award of attorney fees.

Dated: 7/19/10

Respectfully Submitted,

JOHN P. WHELAN, P.C.



John P. Whelan

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20TH day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

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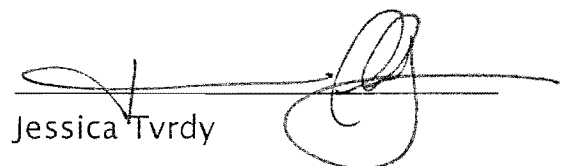
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Jessica Tvrdy

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d' Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED:

2010 JUL 20 PM 2:00

CLERK DISTRICT COURT
Susan Reed
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE
A. LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife,
FIRST AMERICAN TITLE
INSURANCE CO.,

Defendants.

CASE NO. CV-09-992

MOTION TO DISALLOW COSTS AND
ATTORNEY FEES

Hearing Date: August 19, 2010

Time: 3:00 p.m.

Judge: John P. Luster

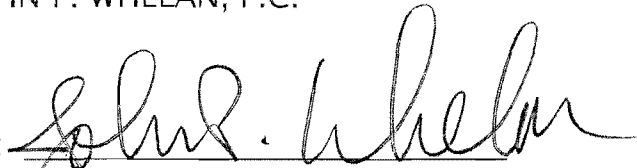
COMES NOW, the Plaintiff, Diana James, by and through her attorney of record, John P. Whelan, pursuant to I.R.C.P. 54(d)(6), objects to the costs and attorney fees claimed by Defendants, Cornelius Mercea and Patricia Mercea in Defendants' Memorandum of Costs and Attorney Fees on the grounds that the memorandum of costs and attorney fees cites no specific basis or argument in

support of the request for costs and attorney fees. Furthermore, the claimed attorney fees are clearly excessive and there is no valid basis for an award of attorney fees and costs. Additionally, the claimed costs are excessive and without documentary support. Accordingly, Plaintiff, objects to Defendants' memorandum of costs and attorney fees in its entirety.

Plaintiff requests oral argument on this motion.

DATED this 19 day of July, 2010.

JOHN P. WHELAN, P.C.

By: 
John P. Whelan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Edward J. Anson
708 Northwest Blvd., Suite 401
Coeur d'Alene, ID 83814

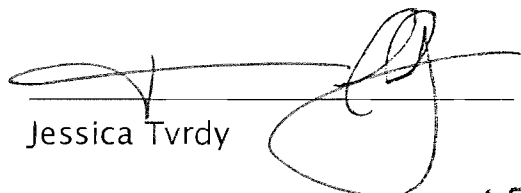
- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile to: 667-8470

Joe Lamphiear and Susan Lamphiear
1021 Crestline Drive
Coeur d'Alene, ID 83814

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile to:

Douglas S. Marfice
Ramsden & Lyons, LLP
700 Northwest Blvd.
P.O. Box 1336
Coeur d'Alene, ID 83816-1336

- ☒ U.S. Mail, Postage Prepaid
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Jessica Tvrdy

JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d' Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 JUL 20 PM 2: 00

CLERK DISTRICT COURT
Chuan Reed
(DEPUTY)

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE
A. LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife,
FIRST AMERICAN TITLE
INSURANCE CO., FIRST AMERICAN
TITLE COMPANY, INC.

Defendants.

CASE NO. CV-09-992

MOTION TO VACATE
JUDGMENT/RECONSIDERATION

Hearing Date: August 19, 2010

Time: 3:00 p.m.

Judge: John P. Luster


COMES NOW, the Plaintiff, Diana James, by and through her attorney of record, John P. Whelan, and moves this Court pursuant to I.R.C.P. 11(a)(2), 52(b) and 59(e) to vacate and/or reconsider the ruling granting the Mercea Defendants summary judgment filed by the Court on July 9, 2010. This motion is made on the grounds that the Court initially denied the Merceas summary judgment on

the exact same set of facts revisited by the Merceas' motion for reconsideration. In the initial summary judgment hearing the Court found the existence of a duty to disclose but the Court reversed itself in granting summary judgment to the Merceas in the course of their motion for reconsideration. This fact alone demonstrates that there exists a genuine issue of law or fact in this action and Plaintiff should be permitted to try her case. This motion is made on the further ground that Plaintiff believes that the Court was operating under misconception of the facts of this case as is demonstrated by the Court's decision filed July 9, 2010 in this action.

Plaintiff requests oral argument on this motion.

DATED this 19th day of July, 2010.

JOHN P. WHELAN, P.C.

By: 
John P. Whelan

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20TH day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Edward J. Anson
708 Northwest Blvd., Suite 401
Coeur d'Alene, ID 83814

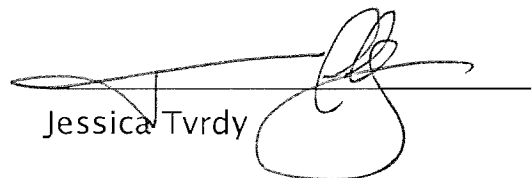
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700 Northwest Blvd.
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Coeur d'Alene, ID 83816-1336

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Jessica Tvrdy

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

2010 AUG -5 PM 12:42

CLERK OF DISTRICT COURT
Paul Gump

Edward J. Anson, ISB No. 2074
WITHERSPOON KELLEY
Attorneys & Counselors
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Telephone: (208) 667-4000
Facsimile: (208) 667-8470
Email: aja@witherspoonkelley.com

*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHEAR and SUSAN M. LAMPHEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

MOTION TO DETERMINE
ATTORNEY'S FEES AND COSTS
AND
NOTICE OF HEARING

Hearing Date: August 19, 2010
Time: 3:00 p.m.
Judge: Honorable John P. Luster

COMES NOW, the Defendants Mercea, by and through their attorney of record,
Edward J. Anson of Witherspoon Kelley, and pursuant to I.R.C.P. 54, respectfully moves this

1 Court for an Order of Settling the amount of attorney's fees and costs, if any, to be awarded to
2 said Defendants.

3 This motion is supported by the Affidavit and Memorandum of Costs and Attorney's
4 Fees previously filed in this action on July 6, 2010, which was thereafter objected to by Plaintiff
5 in her Motion to Disallow Costs and Attorney's Fees dated July 19, 2010. This motion is
6 further supported by that Affidavit of Edward J. Anson filed and served herewith.
7

8 The Defendants Mercea are entitled to an award of attorney's fees on the basis of
9 paragraph 25 of the Real Estate Purchase and Sale Agreement entered into by and between the
10 Merceas and the Plaintiff which provides as follows:
11

12 25. ATTORNEY'S FEES: If either party initiates or defends any arbitration or
13 legal action or proceedings which are in any way connected with this
14 Agreement, the prevailing party shall be entitled to recover from the non-
15 prevailing party reasonable costs and attorney's fees, including such costs and
16 fees on appeal. (*Joint Affidavit of Cornelius Mercea and Patricia Mercea in
Support of Motion for Summary Judgment dated December 1, 2009, Exhibit B
thereto*)

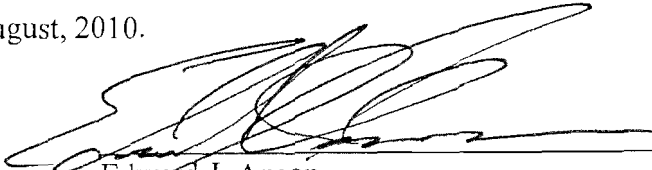
17 That this action was connected with the parties' Real Estate Purchase and Sale
18 Agreement. That the Defendant Merceas are the prevailing party in this action. That the
19 Merceas are entitled to an award of Attorney Fees pursuant to I.R.C.P. 54(e)(5).
20

21 The Defendant Merceas give notice of their intention to produce testimony, evidence,
22 and oral argument at the hearing upon this motion.

23 NOTICE OF HEARING

24 YOU ARE HEREBY NOTIFIED that a hearing on Defendant Mercea's Motion to
25 Determine Attorney's Fees and Costs will be held at the Kootenai County Court House, Coeur
26 d'Alene, Idaho, on the 19th day of August, 2010, at the hour of 3:00 p.m. before the Honorable
27 John P. Luster at the Kootenai County Courthouse located at 324 W. Garden Avenue, Coeur
28 d'Alene, Idaho, or as soon thereafter as counsel may be heard at which time said motion will be
considered.

1 DATED this 5 day of August, 2010.

2
3 
4 Edward J. Anson
5 WITHERSPOON KELLEY
6 The Spokesman Review Building
7 608 Northwest Blvd, Suite 300
8 Coeur d'Alene, Idaho 83814
9 Phone: (208) 667-4000
10 *Attorneys for Defendants Mercea*

11 CERTIFICATE OF SERVICE

12 I HEREBY CERTIFY that on this 5 day of August, 2010, I caused a true and correct
13 copy of MOTION TO DETERMINE ATTORNEY'S FEES AND COSTS AND NOTICE OF
14 HEARING to be forwarded, with all required charges prepaid, by the method(s) indicated
15 below, to the following person(s):

16 John P. Whelan, P.C.
17 Attorney at Law
18 213 N. 4th Street
19 Coeur d'Alene, Idaho 83814
20 *Counsel for Plaintiff*

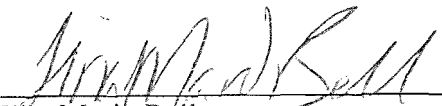
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21 Joe and Sue Lamphiear
22 1021 Crestline Drive
23 Coeur d'Alene, Idaho 83814
24 *Pro Se*

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail

25 Douglas S. Marfice
26 Ramsden & Lyons, LLP
27 P.O. Box 1336
28 Coeur d'Alene, Idaho 83816-1336
*Attorneys for Defendant First American Title
Company, Inc.*

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile: (208) 664-5884

29 
30 TinaMarie Bell

STATE OF IDAHO
COUNTY OF KOOTENAI
FILED

2010 AUG -5 PM 12:42

CLERK DISTRICT COURT

DEPT

Edward J. Anson, ISB No. 2074
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Telephone: (208) 667-4000
Facsimile: (208) 667-8470
ēja@witherspoonkelley.com
Attorneys for Defendants
Cornelius Mercea and Patricia Mercea

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M. LAMPHIEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

AFFIDAVIT OF EDWARD J. ANSON
RE: ATTORNEY FEES

STATE OF IDAHO)
:ss
County of Kootenai)

Edward J. Anson, being first duly sworn, on oath, deposes and says:



1 That I am the attorney for the Merceas in the above referenced action. That I make this
2 affidavit upon my personal knowledge.

3 That I have reviewed the Affidavit and Memorandum of Costs and Attorney's Fees that
4 I filed in this action on July 6, 2010. That in reviewing this matter I noticed that the affidavit
5 contained a mistake. The affidavit states that my hourly rate is \$240.00 per hour. That is an
6 error. During 2009 my hourly rate increased from \$240.00 per hour to \$250.00. The Merceas
7 became my clients during April of 2009, after the increase in my hourly rate. The Merceas
8 were charged for my services at the rate of \$250.00 per hour and paid our fees and costs.
9 Attached hereto as Exhibit 1 is a true and correct copy of my engagement letter with the
10 Merceas dated April 16, 2009 setting forth my hourly rate and the terms of my firm's
11 representation of the Merceas.

12 That in the Affidavit and Memorandum of Costs and Attorney's Fees I stated that I am
13 familiar as to the hourly rate of counsel with similar skill, knowledge, and experience and that
14 my hourly rate is similar to prevailing charges for similar work. In support of that statement I
15 state that the following attorneys have the following hourly rates:

16	ATTORNEY	HOURLY RATE
17	Charles B. Lempesis	\$250.00
18	John F. Magnuson	\$250.00
19	R. Wayne Sweney	\$280.00
20	Susan P. Weeks	\$250.00
21	Dennis M. Davis	\$255.00
22	Mark A. Ellingsen	\$240.00
23	Joel P. Hazel	\$240.00
24	Mischelle R. Fulgham	\$260.00
25	Peter C. Erbland	\$250.00
26		
27		
28		

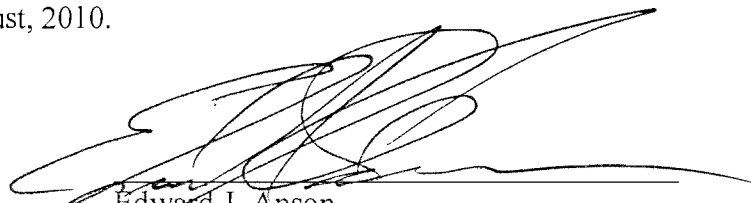
1 Paul W. Daugharty \$250.00

2 Stephen B. McCrea \$240.00

3
4 I discussed the issue of attorney's fees sought by the Merceas in this case with John
5 Magnuson. He advised me that he had recently a similar case which involved a Motion for
6 Summary Judgment and was concluded by a Motion for Reconsideration. While that case had
7 two depositions, it had limited written discovery. In this case written discovery occupies two
8 files. In Mr. Magnuson's case, entitled *Jacklin Land Company v. Blue Dog RV, et al.*, Kootenai
9 County Case No. CV 08-6752, Mr. Magnuson was awarded \$36,875.00 in attorney fees.
10 Attached hereto respectively as Exhibits 2, 3, and 4 are from that case Plaintiff's Memorandum
11 of Costs and Attorney's Fees; Affidavit of John F. Magnuson in Support of Plaintiff's
12 Memorandum of Costs and Attorney's Fees; and Order re: Attorney Fees and Costs.

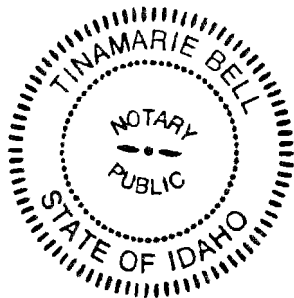
13 In the *American Bank v. BRN Development, Inc.* case presently pending before this
14 Court, given Kootenai County Case No. CV 09-2619, the Plaintiff has filed a Motion for Partial
15 Summary Judgment with arguments set for November 2, 2010. During that case a large
16 number of documents have been produced in discovery and four and a half days of depositions
17 have occurred. In Plaintiff's Memorandum in Support of Motion for Partial Summary
18 Judgment dated July 15, 2010, Plaintiff writes "To date, American Bank has incurred costs,
19 expenses, and attorney's fees in the approximate amount of \$220,000.00." (*Memorandum, page*
20 *22*). While that case is not necessarily directly similar to this case, it is an indication of the
21 amount of attorney's fees that can be incurred up to a motion for partial summary judgment.

22 DATED this 5th day of August, 2010.

23
24 

25 Edward J. Anson
26 WITHERSPOON KELLEY
27 The Spokesman Review Building
28 608 Northwest Blvd, Suite 300
Coeur d'Alene, Idaho 83814
Attorneys for Defendants Mercea

1 SUBSCRIBED AND SWORN to before me this 5th day of August, 2010.



Tina Marie Bell
Notary Public in and for the State of Idaho
Residing at: Hayden, ID
My commission expires: 3-1-16

12 **CERTIFICATE OF SERVICE**

13 I certify that on this the 5 day of August, 2010, I caused a true and correct copy of the
14 AFFIDAVIT OF EDWARD J. ANSON RE: ATTORNEY FEES to be forwarded, with all
15 required charges prepaid, by the method(s) indicated below, to the following person(s):

16 John P. Whelan, P.C.
17 Attorney at Law
18 213 N. 4th Street
19 Coeur d'Alene, Idaho 83814

☐ U.S. Mail
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22 Coeur d'Alene, Idaho 83814
23 *Pro Se*

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24 Douglas S. Marfice
25 P.O. Box 1336
26 Coeur d'Alene, Idaho 83816

☒ U.S. Mail
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☐ Via Fax: (208) 664-5884

27 Tina Marie Bell
28 Tina Marie Bell

EXHIBIT 1

WITHERSPOON, KELLEY, DAVENPORT & TOOLE

A PROFESSIONAL SERVICE CORPORATION
ATTORNEYS & COUNSELORS

COEUR D'ALENE OFFICE

EDWARD J. ANSON**
DENNIS M. DAVIS**
MARK A. ELLINGSEN**
JOEL P. HAZEL*
JENNIFER M. SIMPSON**
JASON S. WING**

SPOKANE OFFICE

ROBERT L. MAGNUSON
NED M. BARNES
WILLIAM D. SYMMES**
ROBERT H. LAMP
K. THOMAS CONNOLLY
THOMAS D. COCHRAN
DUANE M. SWINTON
JOSEPH H. WESSMAN
JEFFREY L. SUPINDER*
LESLIE R. WEATHERHEAD**
MICHAEL D. CURRIN
BRIANT REKOPKE*
R. HAYETTER, JR.*
MICHAEL F. NIENSTEDT*
JOHN M. RILEY III
F. J. DILLANTY, JR.
DANIEL P. FINNEY
MARY E. GIANNINI*
TIMOTHY M. LAWLOR
WILLIAM M. SYMMES**
STANLEY M. SCHWARTZ*
DAVID M. KNUTSON
JODY M. MCCORMICK*
MICHAEL L. LOFT**
ROSS P. WHITE
RICHARD L. MOUNT
ANDREW J. SCHULTHEIS**
SHELLEY N. RIPLEY
CHRISTOPHER G. VARALLO**
KIMBERLY A. KAMEL*
RYAN M. BEAUDOIN*
PATRICIA L. JOHNSON
LARA L. HEMINGWAY
RICHARD A. REPP*
DANIEL M. S. COLEMAN
RYAN K. JENSEN
JULIE B. OLDS*
CEANA VAN DESSEL
STEVEN J. DIXSON
MATTHEW W. DALL*
NATHAN G. SMITH
JACLYN E. CLABO*
SHANE P. COLEMAN*

THE SPOKESMAN REVIEW BUILDING
608 NORTHWEST BOULEVARD, SUITE 300
COEUR D'ALENE, IDAHO 83814-2146
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Fax: (208) 667-8470

SPOKANE OFFICE
1100 U.S. BANK BUILDING
422 WEST RIVERSIDE AVENUE
SPOKANE, WASHINGTON 99201-0700
(509) 624-5265

PORTLAND OFFICE
1515 SW FIFTH AVENUE, SUITE 690
PORTLAND, OREGON 97201
Telephone: (503) 546-2391
Fax: (503) 546-3889

RETIRED
JOHN E. HEATH, JR.
ALLAN H. TOOLE

OF COUNSEL
STANLEY R. SCHULTZ
DONALD J. LUKES

April 16, 2009

Via: Email patriciamercea@msn.com

Cornelius & Patricia Mercea
6641 N. Mesa View Drive
Tucson, AZ 85718

Re: Legal Representation

Dear Mr. and Mercea:

This letter will set forth the basis of the agreement pursuant to which Witherspoon, Kelley, Davenport & Toole, P.S. is delighted to provide legal services to you.

We will undertake the necessary investigation, research, and related work to represent you in connection with the James v. Mercea, Kootenai County Case No. CV09-992 matter. Unless otherwise agreed in writing between our firm and you, our engagement will be limited to this matter and will not involve the general representation of you.

Pursuant to the Rules of Professional Conduct, Witherspoon, Kelley, Davenport & Toole, P.S. bills for fees taking into account a number of factors. The principal factor is the amount of time required in representing a client. Other factors which have a significant bearing on our fees will include the skill required to provide competent representation, familiarity with the specific area of the law involved, the preclusion of success achieved, and the history of our relationship with the client.

Witherspoon, Kelley, Davenport & Toole, P.S. will provide you with a monthly bill for services rendered and costs advanced. While the firm's billing rates may change from time to time, my services will be billed based on an hourly rate of \$250 per hour. The expertise of other lawyers in the firm may also be required.

*--Admitted in Idaho only
* Also admitted in Washington
* Also admitted in Idaho
† Also admitted in Oregon
‡ Also admitted in Montana
** Also admitted in California
Also admitted in Utah
+ Also admitted in New York

Cornelius and Patricia Mercea
April 16, 2009
Page 2

Services of associates and other principals of Witherspoon, Kelley, Davenport & Toole, P.S., who may assist me in this matter, are based on hourly rates (depending upon the lawyer) between \$175 and \$290 per hour. From time to time, the firm reviews and revises these rates, and we will provide written notice to you of any future proposed change in the rates. I would not anticipate any rate changes until the first quarter of 2010.

We have requested that we receive from you the sum of \$10,000 as a retainer. This retainer will be held in trust and will be applied against our final bill. We will expect payment of our monthly invoices within thirty days, and interest on unpaid accounts at the annual rate of 12% will be imposed commencing thirty days after the date of our statement. We did discuss the fact that it is possible that our total fees and costs will significantly exceed \$10,000 and could easily be in the \$30-\$40,000 range. We will attempt to work with you to make suitable financial arrangements. In the event that fails to occur, we will withdraw from representation as discussed below.

When appropriate, we may also use non-lawyer personnel in our office to accomplish tasks at a lower cost to you. These individuals will be assigned tasks under my supervision. For example, we employ law clerks who are law students or recent law graduates. They perform a number of legal research and information-gathering functions, as needed. They will be billed at \$100.00 per hour. We frequently use computer-based legal research facilities which are billed on a unit basis, depending on the total elapsed computer time used.

Our firm typically incurs a variety of out-of-pocket costs arising in connection with the provision of legal services. These expenses include, but are not limited to, such items as long distance telephone charges, copying costs, facsimile costs, experts' fees and travel expenses. These expenses are your responsibility and will be included in monthly billings.

The firm creates and maintains files incident to our representation of clients, and we will do so in connection with our representation of you. These files remain the property of Witherspoon Kelley Davenport & Toole, P.S. and will be maintained in storage for a period of seven years after conclusion of the matter to which they relate, at which time they will be destroyed.

The firm reserves the right to withdraw from representation on fourteen days' notice in the unlikely event that you should seek to involve the firm in any unlawful or unethical activity, fail to cooperate with the firm in the rendition of legal services, fail to remain current as invoiced by the firm, or for any other reason for which this firm deems withdrawal is appropriate.

Cornelius and Patricia Mercea
April 16, 2009
Page 3

We look forward to representing you. If you have any questions about fee arrangements, please give me a call.

Sincerely,

WITHERSPOON, KELLEY, DAVENPORT
& TOOLE, P.S.

By: 

Edward J. Anson

EJA:akg

Q:\CLIENTS-EJA\Mercea 56704\Mercea Engagement ltr w-retainer 04-15-09a.doc

EXHIBIT 2

EXHIBIT 2

JOHN F. MAGNUSON
Attorney at Law
P.O. Box 2350
1250 Northwood Center Court, Suite A
Coeur d'Alene, ID 83814
Phone: (208) 667-0100
ISB #04270

Attorney for Plaintiff

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
FILED

2008 OCT 30 PM 4:18

CLERK DISTRICT COURT
[Signature]
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho
limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho
corporation; THE PATTERSON
FAMILY 2000 TRUST CREATED
U/T/A DATED FEBRUARY 25, 2000;
GAYLEN C. PATTERSON, TRUSTEE;
THE BRANAGH FAMILY 2000 TRUST
CREATED U/T/A DATED JANUARY
13, 2000; JOHN A. BRANAGH,
TRUSTEE; KL PROPERTIES, INC., a
California corporation; RICHARD A.
CORDES and SUZANNE M. CORDES,
husband and wife; DAVID BARNES and
MICHELLE BARNES, husband and wife;
GARY L. PATTERSON and
ELIZABETH PATTERSON, husband and
wife; PHILLIP J. DION and KIMBERLY
L. DION, husband and wife: and
ANDREW J. BRANAGH and ANNE C.
BRANAGH, husband and wife,

Defendants.

CASE NO. CV-08-6752

**PLAINTIFF'S MEMORANDUM
OF COSTS AND ATTORNEY
FEES**

Pursuant to IRCP 54(d) and 54(e), I.C. § 12-120(3), and the accompanying Affidavit of John F. Magnuson (filed herewith), Plaintiff Jacklin Land Company submits and files the following Memorandum of Costs and Fees in the above-captioned matter:

COSTS AS A MATTER OF RIGHT PURSUANT TO IRCP 54(d)(1)(C):

(1) Court Filing Fees:

Filing fee: \$ 88.00

(2) Actual Fees for Service of Any Pleading or Document in the Action, Whether Served by a Public Officer or Other Person:

Service of Complaint:
September 11, 2008: \$ 55.00

(3) Charges for One (1) Copy of Any Deposition Taken by Any of the Parties to the Action in Preparation for Trial of the Action:

Deposition of Pat Leffel: \$ 475.00
Deposition of Tom Stoesser: \$ 430.75

TOTAL: \$1,048.75

**TOTAL COSTS AS A MATTER OF RIGHT PURSUANT
TO IRCP 54(d)(1)(C): \$1,048.75**

COSTS AS A MATTER OF DISCRETION PURSUANT TO IRCP 54(d)(1)(D):

Plaintiff claims as a discretionary cost the sum of \$803.90 in computerized research, as detailed more fully in the accompanying Affidavit of John F. Magnuson, which is respectfully submitted to have been reasonably, necessarily, and exceptionally incurred, and which Plaintiff suggests should be assessed in the interests of justice, given the need to consult authorities outside of the state of Idaho which were controlling on one of the primary issues in the case.

ATTORNEY FEES

John F. Magnuson - 147.5 Hours at \$250.00 per hour: \$36,875.00

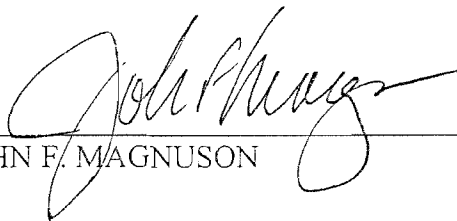
RECAPITULATION:

Costs as of Right:	\$ 1,048.75
Costs as a Matter of Discretion:	\$ 803.90
Attorney Fees:	\$36,875.00

TOTAL COSTS AND FEES: \$38,727.65

The foregoing statement of costs and fees actually incurred by Plaintiff in this action is correct and in compliance with Idaho Rules of Civil Procedure 54(d) and 54(e). The foregoing statement of fees is supported by the Affidavit of John F. Magnuson filed herewith pursuant to IRCP 54(e)(5).

DATED this 30th day of October, 2009.



JOHN F. MAGNUSON

STATE OF IDAHO)
) ss.
COUNTY OF KOOTENAI)

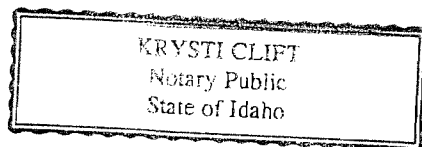
JOHN F. MAGNUSON, being first duly sworn, deposes and states:

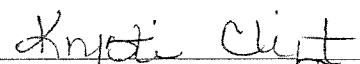
That I am the attorney for the above-named Plaintiff; that I have read the contents of the foregoing Memorandum of Costs and Fees; that to the best of my knowledge and belief, the items therein are true and correct, and that the costs claimed are in compliance with IRCP 54 (d)(5), and that the items in the above bill have been reasonably and necessarily incurred in this action.



JOHN F. MAGNUSON

SUBSCRIBED AND SWORN to before me this 30th day of October, 2009.





Notary Public in and for the State of Idaho
Residing at: Coeur d'Alene
My Commission Expires: 11/13/14

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2009, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Hines

Michael Schmidt

Lukins & Annis, P.S.

1600 Washington Trust Financial
Center

717 W. Sprague Avenue

Spokane, WA 99201-0466

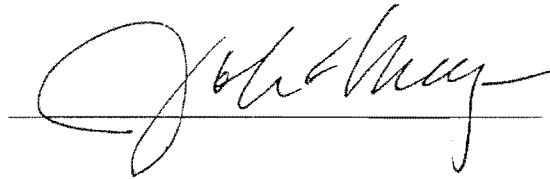
____ US Mail

____ Overnight Mail

X Hand Delivered

____ Facsimile

FAX: 509/747-2323



JACKLIN-BLUE DOG-COST&FEES.MEM.wpd

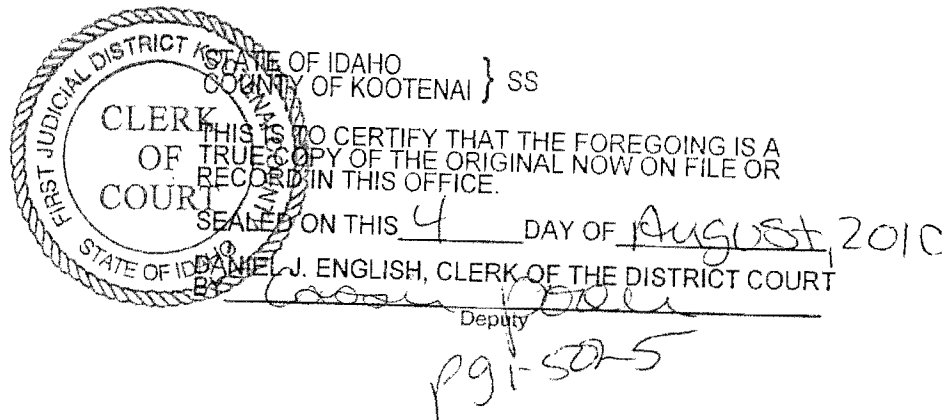


EXHIBIT 3

EXHIBIT 3

JOHN F. MAGNUSON
Attorney at Law
P.O. Box 2350
1250 Northwood Center Court, Suite A
Coeur d'Alene, ID 83814
Phone: (208) 667-0100
ISB #04270

Attorney for Plaintiff

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
FILED

2009 OCT 30 PM 4:18

CLERK DISTRICT COURT
Paul Cunningham
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JACKLIN LAND COMPANY, an Idaho
limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho
corporation; THE PATTERSON
FAMILY 2000 TRUST CREATED
U/T/A DATED FEBRUARY 25, 2000;
GAYLEN C. PATTERSON, TRUSTEE;
THE BRANAGH FAMILY 2000 TRUST
CREATED U/T/A DATED JANUARY
13, 2000; JOHN A. BRANAGH,
TRUSTEE; KL PROPERTIES, INC., a
California corporation; RICHARD A.
CORDES and SUZANNE M. CORDES,
husband and wife; DAVID BARNES and
MICHELLE BARNES, husband and wife;
GARY L. PATTERSON and
ELIZABETH PATTERSON, husband and
wife; PHILLIP J. DION and KIMBERLY
L. DION, husband and wife; and
ANDREW J. BRANAGH and ANNE C.
BRANAGH, husband and wife,

Defendants.

CASE NO. CV-08-6752

**AFFIDAVIT OF JOHN F.
MAGNUSON IN SUPPORT OF
PLAINTIFF'S MEMORANDUM
OF COSTS AND ATTORNEY
FEES**

STATE OF IDAHO)
) ss.
COUNTY OF KOOTENAI)

JOHN F. MAGNUSON, being first duly sworn upon oath, deposes and says:

1. I am the attorney of record for Plaintiff Jacklin Land Company in the above-captioned matter. I am over the age of eighteen, have personal knowledge of the matters set forth herein, and am otherwise competent to testify thereto.

2. I undertook the representation of Jacklin Land Company in this matter in the summer of 2008. My hourly rate in effect at that time for work of this nature was \$250.

3. Between July 24, 2008 and September 30, 2009, I expended 147.5 hours on behalf of the Plaintiff. Attached hereto as Exhibit A, and incorporated by this reference, is an itemization of the specific time expended in the prosecution of the Plaintiff's claims.

4. As of the execution and filing of this Affidavit, I have not yet compiled the time expended in October with respect to matters pertaining to the entry of the Judgment, the Judgment proposed by the Defendants, time associated with the preparation of this Affidavit and the accompanying Cost Bill, and the work associated with the defense of Defendants' motions currently set for hearing on October 29, 2009. Those fees will be added by supplemental affidavit when calculated.

5. The claims asserted by the Plaintiff arise out of a certain Agreement of November 6, 1990 by and between Quality Centers Associates (the predecessor-in-title to Defendants) and Jacklin Land Company. A true and correct copy of the same is attached as Exhibit A to Plaintiff's Complaint on file herein. The Complaint was verified August 22, 2008. Said Agreement is referred to herein as "the subject Agreement." Plaintiff contends that the subject Agreement constitutes a "commercial

transaction” as that phrase is utilized by Idaho Code § 12-120(3) and the case law interpreting the same.

6. I believe, in good faith, and therefore state, that the amount of fees claimed in “Plaintiff’s Memorandum of Costs and Attorney Fees,” as itemized on Exhibit A thereto, is reasonable considering the factors set forth in IRCP 54(e)(3), to-wit:

- (A) The time and labor required: See Exhibit A hereto.
- (B) The novelty and difficulty of the question: Reasonable for an experienced attorney.
- (C) The skill requisite to perform the legal service properly and the experience and ability of the attorney in the particular field of law: Reasonable for an experienced attorney.
- (D) The prevailing charges for like work: The fees requested are within the range of fees in this area.
- (E) Whether the fee is fixed or contingent: Hourly basis.
- (F) Time limitations imposed by client or circumstances of this case: Typical for cases of this nature.
- (G) The amount involved and the results: Plaintiff sued Defendants for breach of a written contract, to which the Defendants had succeeded, and for permanent injunctive relief consistent thereto. The result was the entry of an opinion which entered summary judgment in favor of the Plaintiff and against the Defendants.
- (H) Undesirability of case: Not applicable.
- (I) The nature and length of the professional relationship with the client: I have represented Jacklin Land Company over the past twelve (12) years (approximately) on an occasional basis with respect to matters pertaining to real estate.
- (J) Awards in similar cases: This case is one for permanent injunctive relief and not for monetary damages. Hence, a description of the “award,” in the context of “similar cases,” is largely inapplicable.

- (K) The reasonable cost of automated legal research: This case involved some issues of interpretation and enforcement of CC&Rs which had been addressed in large part by jurisdictions other than Idaho. These issues were, in large part, controlling as to the successful request for injunctive relief. Those costs, which Plaintiff contends were reasonable under the circumstances, include the following:

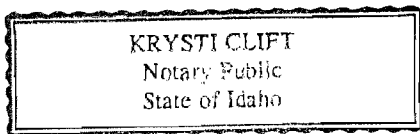
<u>DATE:</u>	<u>RESOURCE SOURCE:</u>	<u>AMOUNT:</u>
1/15/2009	Westlaw	\$129.91
3/24/2009	Westlaw	\$143.74
8/24/2009	Westlaw	\$530.25
TOTAL:		<u>\$803.90</u>

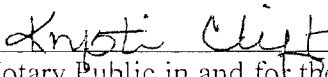
7. Your Affiant further states that the fees claimed herein are reasonable in light of the factors set forth in IRCP 54.

DATED this 30th day of October, 2009.


JOHN F. MAGNUSON

SUBSCRIBED AND SWORN to before me this 30th day of October, 2009.




Notary Public in and for the State of Idaho
Residing at: Coeur d'Alene
My commission expires: 11/13/14

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2009, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Hines

Michael Schmidt

Lukins & Annis, P.S.

1600 Washington Trust Financial Center

717 W. Sprague Avenue

Spokane, WA 99201-0466

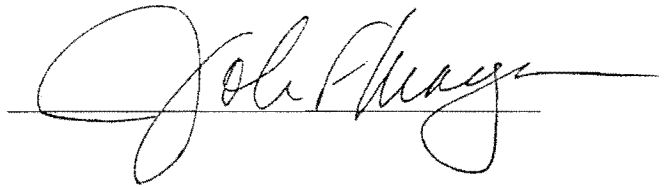
____ US Mail

____ Overnight Mail

X Hand Delivered

____ Facsimile

FAX: 509/747-2323

A handwritten signature in cursive script, appearing to read "John F. Magnuson", is written over a horizontal line.

JACKLIN-BLUE DOG JFM-COST.AFF.wpd

JOHN F. MAGNUSON
ATTORNEY AT LAW
P.O. BOX 2350
COEUR D'ALENE, ID 83816

Invoice submitted to:
Jacklin Land Company
Attn: Tom Stoesser
4752 W. Riverbend Avenue
Post Falls ID 83854

October 19, 2009

In Reference To: Jacklin Land v. Blue Dog
Fee Arrangement: \$250 Hour
File No. 98-151.7

Professional Services

	<u>Hrs/Rate</u>	<u>Amount</u>
7/24/2008 Review documents; conference with DJ.	0.60 \$250.00/hr	\$150.00
7/25/2008 Review client documents; conference with client.	0.40 \$250.00/hr	\$100.00
8/5/2008 Review documents; letter to client; draft demand letter, complaint and related filings; telephone calls and correspondence re: same; letter to/from client.	4.80 \$250.00/hr	\$1,200.00
8/6/2008 Telephone call from counsel; revise pleadings.	0.30 \$250.00/hr	\$75.00
8/7/2008 Revise complaint; draft verification, correspondence; work on service issues; telephone call to/from counsel.	1.30 \$250.00/hr	\$325.00
8/8/2008 Letter to client.	0.30 \$250.00/hr	\$75.00
8/12/2008 Conference with client; letter to JB; review file; draft and revise correspondence.	1.10 \$250.00/hr	\$275.00
8/13/2008 Telephone call from JB; letter to/from client .	0.50 \$250.00/hr	\$125.00
8/19/2008 Telephone call to/from JB.	0.30 \$250.00/hr	\$75.00
Letter from client.	0.20 \$250.00/hr	\$50.00

EXHIBIT A

435

	<u>Hrs/Rate</u>	<u>Amount</u>
8/22/2008 Conference with client; finalize complaint; letter to JB; letter from client; file complaint.	1.00 \$250.00/hr	\$250.00
8/25/2008 Telephone call to/from client.	0.20 \$250.00/hr	\$50.00
8/26/2008 Telephone call to/from client; letter re: same; letter from client.	0.40 \$250.00/hr	\$100.00
8/27/2008 Letter from client, to counsel.	0.30 \$250.00/hr	\$75.00
8/28/2008 Telephone call from and correspondence to JB.	0.20 \$250.00/hr	\$50.00
9/2/2008 Letter to court; letter from JB.	0.40 \$250.00/hr	\$100.00
9/9/2008 Letter from court.	0.20 \$250.00/hr	\$50.00
9/10/2008 Telephone call from AB; telephone call from JB.	0.40 \$250.00/hr	\$100.00
9/11/2008 Letter to/from client.	0.20 \$250.00/hr	\$50.00
9/15/2008 Letter from client; letter from AB, JB.	0.60 \$250.00/hr	\$150.00
9/16/2008 Letter to client.	0.30 \$250.00/hr	\$75.00
9/17/2008 Letter from client.	0.20 \$250.00/hr	\$50.00
9/19/2008 Draft default notice, correspondence.	0.30 \$250.00/hr	\$75.00
9/22/2008 Miscellaneous correspondence.	0.20 \$250.00/hr	\$50.00
9/23/2008 Miscellaneous correspondence.	0.20 \$250.00/hr	\$50.00
9/29/2008 Conference with MH; multiple correspondence from MH.	0.50 \$250.00/hr	\$125.00
10/1/2008 Telephone call to court; letter to/from client.	0.30 \$250.00/hr	\$75.00

	<u>Hrs/Rate</u>	<u>Amount</u>
10/2/2008 Telephone call to/from court; letter to client.	0.20 \$250.00/hr	\$50.00
10/4/2008 Letter from client.	0.20 \$250.00/hr	\$50.00
10/8/2008 Letter to client; draft discovery.	0.30 \$250.00/hr	\$75.00
10/13/2008 Work on summary judgment motion; draft multiple discovery requests, notes, correspondence.	1.60 \$250.00/hr	\$400.00
10/15/2008 Telephone call to/from opposing counsel.	0.20 \$250.00/hr	\$50.00
10/16/2008 Revise correspondence, discovery.	0.40 \$250.00/hr	\$100.00
10/17/2008 Revise discovery.	0.20 \$250.00/hr	\$50.00
10/20/2008 Telephone call to/from MH.	0.20 \$250.00/hr	\$50.00
10/21/2008 Conference with client; letter from court.	0.40 \$250.00/hr	\$100.00
10/24/2008 Telephone call to/from MH.	0.20 \$250.00/hr	\$50.00
10/27/2008 Letter from MH; work on discovery responses, multiple correspondence to clients, counsel.	0.60 \$250.00/hr	\$150.00
10/28/2008 Conference with client; memo to file.	0.40 \$250.00/hr	\$100.00
10/30/2008 Letter to client.	0.20 \$250.00/hr	\$50.00
10/31/2008 Review title documents, information re: discovery responses.	0.30 \$250.00/hr	\$75.00
11/3/2008 Conference with client.	0.20 \$250.00/hr	\$50.00
11/5/2008 Conference with CD; letter to City of PF, CD, TS.	0.50 \$250.00/hr	\$125.00
11/6/2008 Conference with client; revise correspondence.	0.40 \$250.00/hr	\$100.00

	<u>Hrs/Rate</u>	<u>Amount</u>
11/7/2008 Work on affidavit; letter to/from MH.	0.40 \$250.00/hr	\$100.00
11/17/2008 Letter to/from CD, client.	0.30 \$250.00/hr	\$75.00
11/20/2008 Work on discovery.	0.20 \$250.00/hr	\$50.00
11/21/2008 Letter from City, to client, CD.	0.30 \$250.00/hr	\$75.00
11/25/2008 Meet with clients re: discovery responses; prepare same; review Defendants' responses; letter re: same.	1.40 \$250.00/hr	\$350.00
Conference with clients.	1.00 \$250.00/hr	\$250.00
11/26/2008 Conference with client; work on discovery.	0.50 \$250.00/hr	\$125.00
11/28/2008 Answer discovery requests; review file, correspondence; work on summary judgment answer.	5.60 \$250.00/hr	\$1,400.00
12/1/2008 Multiple letters to/from client, counsel; draft affidavits; review record; finalize discovery responses; conference with clients, counsel.	7.80 \$250.00/hr	\$1,950.00
12/2/2008 Conference with client; work on summary judgment motion, discovery; miscellaneous correspondence; revise filings.	3.00 \$250.00/hr	\$750.00
12/3/2008 Letter to client.	0.20 \$250.00/hr	\$50.00
12/4/2008 Letter to/from client; conference with PL, client; letter re: same; revise affidavit.	1.30 \$250.00/hr	\$325.00
12/5/2008 Work on summary judgment motion.	0.30 \$250.00/hr	\$75.00
12/8/2008 Telephone call to PF; draft statement of material facts, etc.; revise same; work on brief; letter to/from court.	5.80 \$250.00/hr	\$1,450.00
12/9/2008 Revise pleadings.	0.70 \$250.00/hr	\$175.00
12/10/2008 Draft brief; research same.	2.70 \$250.00/hr	\$675.00
12/11/2008 Work on summary judgment submittals; work on brief; letter to/from counsel; revise brief.	3.10 \$250.00/hr	\$775.00

	<u>Hrs/Rate</u>	<u>Amount</u>
12/12/2008 Letter to/from client; conference with counsel; miscellaneous correspondence.	0.60 \$250.00/hr	\$150.00
12/15/2008 Letter to/from client.	0.20 \$250.00/hr	\$50.00
12/16/2008 Letter from counsel; letter to/from MH, client.	0.50 \$250.00/hr	\$125.00
12/17/2008 Letter to/from client, counsel.	0.90 \$250.00/hr	\$225.00
12/18/2008 Miscellaneous correspondence.	0.20 \$250.00/hr	\$50.00
12/19/2008 Letter to/from MH; conference with client.	0.40 \$250.00/hr	\$100.00
12/22/2008 Letter to/from MH; telephone call from court, to counsel.	0.40 \$250.00/hr	\$100.00
12/23/2008 Multiple correspondence.	0.40 \$250.00/hr	\$100.00
12/29/2008 Multiple letters; letter from MH.	0.50 \$250.00/hr	\$125.00
12/30/2008 Letter to PL; telephone call to court; letter to counsel; conference with client.	0.80 \$250.00/hr	\$200.00
12/31/2008 Miscellaneous correspondence; letter from MH.	0.40 \$250.00/hr	\$100.00
1/5/2009 Miscellaneous correspondence; letter from MH; letter from court.	0.60 \$250.00/hr	\$150.00
1/6/2009 Miscellaneous correspondence; letter to MH.	0.40 \$250.00/hr	\$100.00
1/7/2009 Letter to/from counsel, MH; telephone call to court.	0.40 \$250.00/hr	\$100.00
1/8/2009 Telephone call to court; letter to court; revise notice; miscellaneous correspondence.	0.50 \$250.00/hr	\$125.00
1/9/2009 Miscellaneous correspondence.	0.40 \$250.00/hr	\$100.00
1/12/2009 Miscellaneous correspondence; work on summary judgment issues.	0.70 \$250.00/hr	\$175.00

	<u>Hrs/Rate</u>	<u>Amount</u>
1/13/2009 Miscellaneous correspondence; review order from court; letter to client; memo to file.	0.70 \$250.00/hr	\$175.00
1/14/2009 Multiple correspondence re: hearing dates; telephone call to/from counsel.	0.70 \$250.00/hr	\$175.00
1/15/2009 Letter from counsel; conference with client.	0.50 \$250.00/hr	\$125.00
1/19/2009 Miscellaneous correspondence; pleadings from MH; meet with clients, witnesses re: depo preparations; prepare for depositions.	2.50 \$250.00/hr	\$625.00
1/20/2009 Prepare for and attend depo of Pat Leffel; conference with witness for depo preparation; multiple correspondence.	6.00 \$250.00/hr	\$1,500.00
1/21/2009 Miscellaneous correspondence.	0.20 \$250.00/hr	\$50.00
1/22/2009 Miscellaneous correspondence; letter to MH.	0.40 \$250.00/hr	\$100.00
1/23/2009 Prepare for and attend depositions of JLCO, T. Stoesser; conference with client.	5.20 \$250.00/hr	\$1,300.00
2/2/2009 Conference with client.	0.20 \$250.00/hr	\$50.00
2/4/2009 Letter to MH.	0.20 \$250.00/hr	\$50.00
2/5/2009 Work on summary judgment issues; conference with MH; letter to client.	0.60 \$250.00/hr	\$150.00
2/6/2009 Miscellaneous calls.	0.20 \$250.00/hr	\$50.00
2/8/2009 Miscellaneous correspondence; letter to client; review depo transcripts.	0.90 \$250.00/hr	\$225.00
2/10/2009 Telephone call to client; telephone call from MH.	0.40 \$250.00/hr	\$100.00
2/11/2009 Conference with client; letter to MH.	0.30 \$250.00/hr	\$75.00
2/17/2009 Conference with client; review Blue Dog pleadings.	0.50 \$250.00/hr	\$125.00
2/18/2009 Review summary judgment materials; letter re: same; letter to MH.	0.50 \$250.00/hr	\$125.00

	<u>Hrs/Rate</u>	<u>Amount</u>
2/19/2009 Miscellaneous correspondence.	0.20 \$250.00/hr	\$50.00
2/23/2009 Letter to/from MH; conference with client.	0.60 \$250.00/hr	\$150.00
2/24/2009 Work on summary judgment response; draft multiple pleadings; review Defendants' submissions; revise pleadings.	9.60 \$250.00/hr	\$2,400.00
2/25/2009 Research; draft brief; review record; conference with client; draft correspondence; revise brief.	6.50 \$250.00/hr	\$1,625.00
2/26/2009 Letter to/from client.	0.40 \$250.00/hr	\$100.00
3/2/2009 Letter to MH.	0.20 \$250.00/hr	\$50.00
3/3/2009 Review Blue Dog's submittals; prepare for summary judgment hearing; attend and argue same.	5.80 \$250.00/hr	\$1,450.00
3/4/2009 Conference with counsel, client.	0.20 \$250.00/hr	\$50.00
3/30/2009 Research; letter to court; draft supplemental notice re: same.	0.30 \$250.00/hr	\$75.00
5/8/2009 Conference with MD; letter to City of PF.	0.30 \$250.00/hr	\$75.00
5/14/2009 Letter to PF, client.	0.30 \$250.00/hr	\$75.00
5/29/2009 Letter from PF, to client.	0.20 \$250.00/hr	\$50.00
6/11/2009 Conference with client.	0.20 \$250.00/hr	\$50.00
6/15/2009 Review court's decision; conference with client.	0.70 \$250.00/hr	\$175.00
6/16/2009 Research; letter to client; conference with client; telephone call to court; review decision.	2.00 \$250.00/hr	\$500.00
6/17/2009 Telephone call to/from court; letter to client.	0.50 \$250.00/hr	\$125.00
6/19/2009 Letter to MH, client.	0.30 \$250.00/hr	\$75.00

	<u>Hrs/Rate</u>	<u>Amount</u>
6/22/2009 Work on motion; research; letter to client.	0.60 \$250.00/hr	\$150.00
6/25/2009 Conference with counsel.	0.20 \$250.00/hr	\$50.00
6/29/2009 Work on second summary judgment motion.	0.50 \$250.00/hr	\$125.00
7/7/2009 Letter from MH.	0.20 \$250.00/hr	\$50.00
7/8/2009 Work on second summary judgment motion; research summary judgment issues.	1.50 \$250.00/hr	\$375.00
7/9/2009 Work on summary judgment; letter to/from client.	0.40 \$250.00/hr	\$100.00
7/10/2009 Draft summary judgment motion and related pleadings, correspondence; research.	1.20 \$250.00/hr	\$300.00
7/13/2009 Draft brief; revise same.	5.90 \$250.00/hr	\$1,475.00
7/14/2009 Draft pleadings, correspondence; review file.	0.70 \$250.00/hr	\$175.00
7/15/2009 Revise pleadings, correspondence; conference with client.	0.60 \$250.00/hr	\$150.00
7/16/2009 Letter to MH.	0.30 \$250.00/hr	\$75.00
7/20/2009 Letter to MH.	0.20 \$250.00/hr	\$50.00
7/23/2009 Telephone call to/from MH; letter to client, MH, judge.	0.80 \$250.00/hr	\$200.00
7/24/2009 Revise correspondence; letter to/from client; telephone call from MH.	0.60 \$250.00/hr	\$150.00
7/27/2009 Telephone call to/from client; conference with client; review materials; letter to MH.	0.80 \$250.00/hr	\$200.00
7/28/2009 Letter from MH; review Blue Dog's motion; letter to/from MH, BC; revise correspondence.	0.80 \$250.00/hr	\$200.00
7/30/2009 Miscellaneous correspondence.	0.40 \$250.00/hr	\$100.00

	<u>Hrs/Rate</u>	<u>Amount</u>
8/5/2009 Letter from and call to client.	0.20 \$250.00/hr	\$50.00
8/6/2009 Review Blue Dog motion, etc; research same; draft response, second brief; review record; revise briefing.	7.60 \$250.00/hr	\$1,900.00
8/7/2009 Letter to/from MH, client; telephone call from MH; letter to client.	0.50 \$250.00/hr	\$125.00
8/10/2009 Prepare for hearing; review defendant's reply briefing, cases; conference with client; attend hearing.	4.20 \$250.00/hr	\$1,050.00
8/11/2009 Conference with client.	0.20 \$250.00/hr	\$50.00
9/1/2009 Telephone call to/from MH.	0.20 \$250.00/hr	\$50.00
9/2/2009 Research.	0.30 \$250.00/hr	\$75.00
9/3/2009 Conference with client.	0.20 \$250.00/hr	\$50.00
9/8/2009 Telephone call from MH.	0.20 \$250.00/hr	\$50.00
9/14/2009 Review Court's decision; letter to/from client.	0.60 \$250.00/hr	\$150.00
9/15/2009 Conference with client; letter to/from client.	0.60 \$250.00/hr	\$150.00
9/16/2009 Telephone call from court; letter to MH; work on judgment form issues.	0.50 \$250.00/hr	\$125.00
9/17/2009 Letter to/from MH, court, client; telephone call from court.	0.70 \$250.00/hr	\$175.00
9/21/2009 Work on judgment, injunction; letter to client, counsel; review decisions; revise judgment.	2.00 \$250.00/hr	\$500.00
9/28/2009 Letter to MH.	0.20 \$250.00/hr	\$50.00
9/30/2009 Letter to counsel.	0.20 \$250.00/hr	\$50.00
For professional services rendered	147.50	\$36,875.00

EXHIBIT 4

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

2010 APR 13 PM 3:40

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CLERK DISTRICT COURT

Sharon Reed
DEPUTY

JACKLIN LAND COMPANY, an Idaho
limited partnership,

Plaintiff,

vs.

BLUE DOG RV, INC., an Idaho
corporation; THE PATTERSON
FAMILY 2000 TRUST CREATED
U/T/A DATED FEBRUARY 25, 2000;
GAYLEN C. PATTERSON, TRUSTEE;
THE BRANAGH FAMILY 2000 TRUST
CREATED U/T/A DATED JANUARY
13, 2000; JOHN A. BRANAGH,
TRUSTEE; KL PROPERTIES, INC., a
California corporation; RICHARD A.
CORDES and SUZANNE M. CORDES,
husband and wife; DAVID BARNES and
MICHELLE BARNES, husband and wife;
GARY L. PATTERSON and
ELIZABETH PATTERSON, husband and
wife; PHILLIP J. DION and KIMBERLY
L. DION, husband and wife; and
ANDREW J. BRANAGH and ANNE C.
BRANAGH, husband and wife,

Defendants.

CASE NO. CV-08-6752

**ORDER RE: ATTORNEY FEES AND
COSTS**

THE COURT, being fully advised in the premises, hereby finds as follows:

1. On June 15, 2009, the Court entered its "Memorandum Decision and Order on Cross-Motions for Summary Judgment." The Court's Memorandum Decision and Order determined, inter alia, that Defendants had, as a matter of law, breached certain terms of the Quality Centers

Associates/Jacklin Land Company Agreement of November 6, 1990 (recorded as Kootenai County Instrument No. 1200512).

2. On September 14, 2009, the Court entered its "Memorandum Decision and Order on Cross-Motions for Summary Judgment," granting Plaintiff's request for a permanent injunction enjoining the Defendants' breaches of the QCA/Jacklin Agreement (as were determined to exist, as a matter of law, through the June 15, 2009 "Memorandum Decision and Order").

3. On October 19, 2009, the Court entered its Judgment consistent with the Court's "Memoranda Decisions and Orders" of June 15, 2009 and September 14, 2009.

4. On October 30, 2009, Jacklin filed its Memorandum of Costs and Attorney Fees and a supporting Affidavit of counsel. Jacklin requested an award of the following sums:

Costs as a matter of right:	\$ 1,048.75
-----------------------------	-------------

Costs as a matter of discretion:	\$ 803.90
----------------------------------	-----------

Attorney fees:	<u>\$36,875.00</u>
----------------	--------------------

TOTAL:	\$38,727.65
---------------	--------------------

Jacklin's request for an award of attorney fees was made pursuant to I.C. §12-120(3).

5. On November 12, 2009, Defendants objected to Jacklin's request for an award of attorney fees and costs and moved to disallow the same.

6. On March 12, 2010, the Defendants' "Motion to Disallow Costs and Objections to Jacklin's Memorandum of Attorney Fees" came on for hearing before the Court at 10:00 a.m. Plaintiffs were represented by attorney John F. Magnuson. Defendants were represented by attorney Michael J. Hines.

7. On April 6, 2010, the Court convened a hearing for purposes of orally announcing

its decision. The Court's decision is as set forth on the record of proceedings held April 6, 2010 at 4:00 p.m.

8. As set forth in full on the record of proceedings held April 6, 2010 at 4:00 p.m., the Court finds that the QCA/Jacklin Agreement constitutes a "commercial transaction" between Jacklin and QCA, as well as a "commercial transaction" to which Defendants have succeeded, this satisfying the requirements of I.C. §12-120(3). Plaintiff's request for an award of attorney fees is properly encompassed by I.C. §12-120(3) and is otherwise timely and reasonable (the Defendants having made no claim that the fees set forth in Plaintiff's "Memorandum of Fees and Costs" are unreasonable).

9. Plaintiff is the prevailing party.

10. The Court has considered the factors set forth in IRCP 54(e)(3), and has set forth its rationale regarding the same on the record of proceedings held April 6, 2010. Said reasons and rationale, as set forth on the transcript of proceedings as noted, are incorporated herein as though set forth in full.

11. Plaintiff is entitled to recover its costs as a matter of right.

12. The Court, exercising its discretion, declines to award Plaintiffs the requested discretionary costs. The Court specifically finds that said discretionary costs, although reasonably incurred, were not exceptional.

13. Counsel for Plaintiff shall present a proposed judgment consistent with this Order for

entry by the Court.

IT IS SO ORDERED.

ENTERED this 12 day of April, 2010.

Lansing L. Haynes
LANSING HAYNES, District Judge

CERTIFICATE OF SERVICE

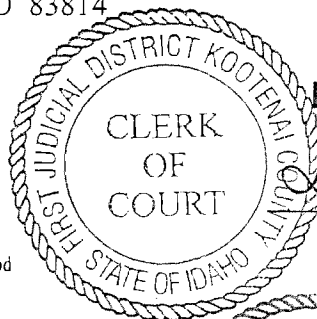
I hereby certify that on the 13 day of April, 2010, I served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Michael J. Hines
Michael Schmidt
Lukins & Annis, P.S.
1600 Washington Trust Financial Center
717 W. Sprague Avenue
Spokane, WA 99201-0466

____ US Mail
____ Overnight Mail
____ Hand Delivered
X Facsimile
FAX: 509/747-2323 # 311 / # 335

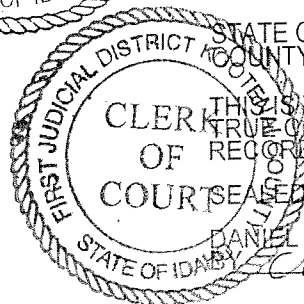
John F. Magnuson
Attorney at Law
P.O. Box 2350
1250 Northwood Center Court, Suite A
Coeur d'Alene, ID 83814

____ US Mail
____ Overnight Mail
____ Hand Delivered
X Facsimile
FAX: 208/667-0500 # 311 / # 335



JACKLIN-BLUE DOG.ORDER.wpd

DANIEL J. ENGLISH



STATE OF IDAHO }
COUNTY OF KOOTENAI } SS

THIS IS TO CERTIFY THAT THE FOREGOING IS A TRUE COPY OF THE ORIGINAL NOW ON FILE OR RECORD IN THIS OFFICE.

SEAL ON THIS 4 DAY OF August, 2010
DANIEL J. ENGLISH, CLERK OF THE DISTRICT COURT

Deputy

ORDER RE: ATTORNEY FEES AND COSTS -- PAGE 4

pg 1-4 of 4

498

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2010 AUG -6 PM 1:11

CLERK DISTRICT COURT

Patty Bailey
DEPUTY

Edward J. Anson, ISB No. 2074
WITHERSPOON KELLEY
Attorneys & Counselors
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Telephone: (208) 667-4000
Facsimile: (208) 667-8470
Email: ēja@witherspoonkelley.com

*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M. LAMPHIEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

RESPONSE TO PLAINTIFF'S MOTION
TO VACATE JUDGMENT /
RECONSIDERATION

COURSE OF PROCEEDINGS

The Plaintiff is asking this Court to basically reconsider its memorandum decision entered on June 25, 2010. While the Plaintiff's motion states that is being made pursuant to

1 I.R.C.P. 11(a)(2), 52(b) and 59(e), Plaintiff's supporting memorandum cites only I.R.C.P.
2 60(b)(6). The Merceas submit that I.R.C.P. 11(a)(2) is inapplicable in that the motion is
3 probably directed to the final judgment dismissing Plaintiff's Complaint as Against Merceas
4 entered on July 9, 2010. If that is the case, then I.R.C.P. 11(a)(2) is inapplicable in that the
5 judgment is not an interlocutory order. Further, I.R.C.P. 52(b) is inapplicable because the
6 judgment and the memorandum decision are both neither findings of fact or conclusions of law.
7 It appears inappropriate for a Court to reconsider the legal basis of a decision under I.R.C.P.
8 60(b)(6). *First Bank and Trust v. Parker Brothers*, 112 Idaho 30, 730 P2d 950 (1986). In all
9 probability the Plaintiff is left with her I.R.C.P 59(e) motion. If that motion were directed solely
10 at the memorandum decision it would be untimely under the rule. In all probability the better
11 analysis is that Plaintiff's motion is directed at the judgment and as such the motion is timely. In
12 the event this case proceeds further it would be appropriate for this Court to clarify under which
13 rule the Court finds that the Plaintiff is proceeding.

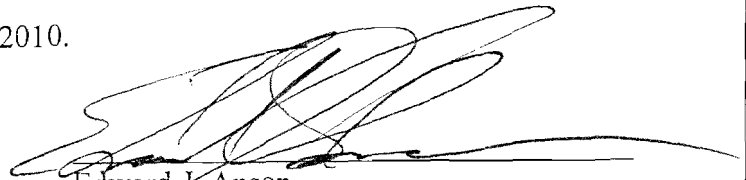
14 THE PLAINTIFF'S MOTION SHOULD BE DENIED

15 The basic premise of Plaintiff's motion is that in the Court's initial ruling on summary
16 judgment Plaintiff argues that the Court found a duty to disclose but then reversed itself on
17 Merceas' Motion for Reconsideration and found no duty to disclose under the facts of the case.
18 To the Plaintiff, the fact that Plaintiff believes the Court made two diametrically opposed
19 findings demonstrates a triable issue of fact or law. The Court, however, did not find a duty to
20 disclose in the initial ruling but only that there were possible factual inferences sufficient to
21 preclude the granting of summary judgment on the constructive fraud issue.

22 Upon reconsideration the Court reviewed the uncontested material facts in this case and
23 found that there was no evidence or any inferences from the evidence that the Merceas were
24 aware that James was ignorant of the location of the public right-of-way. The Merceas have
25 filed herewith their second joint affidavit that further clarifies that they were not aware of
26 Plaintiff's ignorance. That at all times prior to the commencement of this action the Merceas
27 were not aware that the Plaintiff was ignorant as to the location of the boundary lines of the
28 subject real property.

1 The Plaintiff further appears to argue that as the Court declared that there was no duty to
2 disclose under the facts of this case that the Court was invading the realm of the jury by so
3 ruling. What the Plaintiff overlooks is that the Court based its ruling on the undisputed facts of
4 this case. As the Court wrote in its decision *citing Berg v. Fairman*, 107 Idaho 441, at 444, 690
5 P2d 896 (1984), "The purpose of the summary judgment proceedings is to eliminate the
6 necessity of trial where facts are not in dispute and whether existent and undisputed facts lead to
7 a conclusion of law which is certain." The Merceas respectfully submit that that is exactly what
8 this Court did, that both the memorandum decision and judgment are appropriate, and that
9 Plaintiff's motion should properly be denied.

10 DATED this 5th day of August, 2010.



Edward J. Anson
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Blvd, Suite 300
Coeur d'Alene, Idaho 83814
Phone: (208) 667-4000
Attorneys for Defendants Mercea

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2010, I caused a true and correct copy of RESPONSE TO PLAINTIFF'S MOTION TO VACATE JUDGMENT / RECONSIDERATION to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
Counsel for Plaintiff

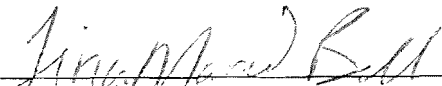
☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile: (208) 664-2240

Joe and Sue Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814
Pro Se

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail

Douglas S. Marfice
Ramsden & Lyons, LLP
P.O. Box 1336
Coeur d'Alene, Idaho 83816-1336
Attorneys for Defendant First American Title Company, Inc.

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile: (208) 664-5884


Tina Marie Bell

Edward J. Anson, ISB No. 2074
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Facsimile: (208) 667-8470
ēja@witherspoonkelley.com
Attorneys for Defendants
Cornelius Mercea and Patricia Mercea

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

2010 AUG 10 PM 1:39

CLERK DISTRICT COURT

DEPT

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M. LAMPHIEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

AFFIDAVIT OF EDWARD J. ANSON
IN RESPONSE TO PLAINTIFF'S
OBJECTION TO MERCEAS'
MEMORANDUM OF COSTS AND
ATTORNEY'S FEES

STATE OF IDAHO)
:SS
County of Kootenai)

Edward J. Anson, being first duly sworn, on oath, deposes and says:



1 That I am a member of the firm of Witherspoon Kelley, attorneys for the Merceas
2 herein. That I make this affidavit on the basis of my personal knowledge.

3 That since my affidavit of August 5, 2010 I have learned that both Scot D. Nass and
4 Michael B. Hague each have hourly rates of \$250.00. That based upon the information
5 contained in my earlier affidavit, and based upon the foregoing, an hourly rate of \$250.00 for
6 me is similar to the hourly rates of other local attorneys with similar skill, knowledge, and
7 experience.

8 In Plaintiff's Memorandum in Support of her Objection to the Merceas' Memorandum
9 of Costs and Attorney's Fees, Plaintiff's counsel writes "Defendants seek to recover \$3,053.00
10 for work performed by attorney Kimberly A. Kamel. Ms. Kamel has been licensed in the State
11 of Idaho since 2004 and her claimed hourly rate of \$215.00 is unreasonable and excessive for
12 an attorney of limited experience." (*Memorandum, page 4*). Actually, Ms. Kamel has been
13 licensed in the State of Idaho since 2005. However, as set forth in the Affidavit and
14 Memorandum of Costs and Attorney's Fees, Ms. Kamel has been licensed in the State of
15 Washington since 2000 and thus has ten years of experience. Mr. Whelan's affidavit states that
16 he has been licensed to practice law for twenty-eight years, however, a significant majority of
17 that time was prior to Mr. Whelan being licensed in the State of Idaho. Obviously Mr. Whelan
18 values his experience prior to his admission to the Idaho Bar, and I submit the same is true for
19 Ms. Kamel and that her hourly rate of \$215.00 is reasonable and comparable to an attorney
20 with similar skill, knowledge, and experience.

21 In his Memorandum Mr. Whelan writes that on April 14, 2009 I spent 1.6 hours for
22 travel to and from the subject property and inspecting and photographing the property while
23 Mr. Whelan reported one hour in his time records. Mr. Whelan is correct in stating that we
24 were together the entire time while we were on the subject property. What Mr. Whelan does
25 not realize is that after Mr. Whelan and I left the subject property I remained in the area and
26 inspected the Lamphiear property from Crestline Drive and Stanley Hill Road.

27 Mr. Whelan criticizes the time spent on preparing what he describes as "standard
28 discovery requests." While portions of those discovery requests were standardized, portions

1 were not. That a true and correct copy of the discovery requests is attached hereto as exhibit A
2 and by this reference incorporated herein.

3 Mr. Whelan notes that on February 24, 2010 and March 4, 2010 my time records reflect
4 telephone conversations with Mr. Whelan but his records do not. Mr. Whelan infers that one of
5 those telephone conversations did not take place. Mr. Whelan's time records reflect a telephone
6 conversation with me on March 10, 2010 which is not noted in my time records. I believe that
7 the telephone conversation took place and it was simply not noted in my time records.
8 Likewise I believe the February 24, 2010 and March 4, 2010 telephone conversations took
9 place and that they simply were not noted in Mr. Whelan's time records.

10 Mr. Whelan questions why I would have two telephone conversations with the court
11 reporter. I had those conversations to order a partial transcript of the proceedings on the initial
12 Summary Judgment Hearing and to identify to the reporter what portion of the hearing that I
13 desired to have transcribed. The partial transcript became an exhibit to the Merceas' Response
14 to Plaintiff's Motion for Reconsideration.


15 The basic premise of Plaintiff's objection to the Merceas' Memorandum of Costs and
16 Attorney's Fees is that as Witherspoon Kelley attorneys spent nearly twice the time on the case
17 as Mr. Whelan, therefore Witherspoon Kelley's time was "excessive and patently
18 unreasonable." That conclusion assumes, however, that the amount of time spent by Mr.
19 Whelan was reasonable. A contrary conclusion can be reached, being that the Witherspoon
20 Kelley time was reasonable and that Mr. Whelan failed to devote sufficient time to the case.
21 For example, Mr. Whelan's time records reflect that he spent six minutes reviewing the
22 Merceas' Motion for Reconsideration. He has no time entry for reviewing the Memorandum in
23 Support of the Motion for Reconsideration which was filed and served some eleven days later.
24 Mr. Whelan has no time entry for reviewing the partial transcript of the hearing upon the
25 Motion for Summary Judgment. Mr. Whelan has no time entry for preparing for the hearing on
26 the Motion for Reconsideration. In short, it appears that Mr. Whelan spent all of six minutes in
27 reviewing the Merceas' Motion for Reconsideration and supporting Memorandum and in
28 preparation for the hearing. Perhaps Mr. Whelan realized that the Merceas were going to

1 prevail on their Motion for Reconsideration and that spending any additional time would be a
2 waste. But if that were in fact the case, that would appear to be contradicted by the fact that
3 Mr. Whelan did appear at the hearing on the motion. Mr. Whelan may wish to reconsider
4 whether he is spending sufficient time on his cases.

5 In reviewing the various legal issues in this matter, Witherspoon Kelley attorneys read
6 numerous case decisions. Copies were made of those decisions thought to be helpful or useful.
7 Our file of such legal research contains copies of forty-six such decisions. Mr. Whelan's time
8 records identify eighteen minutes spent on legal research in connection with the summary
9 judgment motion. It probably took me approximately eighteen minutes just to read and
10 understand the *Toner v. Lederle Laboratories* case cited in our Memorandum in Support of the
11 Merceas' Motion for Reconsideration, and probably an even longer period of time to read
12 *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, (1976) which
13 I read and reviewed but ultimately did not utilize it by citation in the Memorandum.

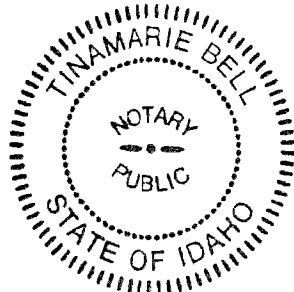
14 To the best of my knowledge all items set forth in the Affidavit and Memorandum of
15 Costs and Attorney's Fees are correct and that all items claimed are in compliance with I.R.C.P.
16 54.

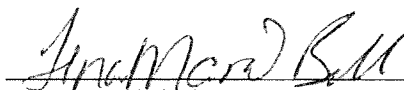
17 DATED this 9th day of August, 2010.



Edward J. Anson
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Blvd, Suite 300
Coeur d'Alene, Idaho 83814
Attorneys for Defendants Mercea

24 SUBSCRIBED AND SWORN to before me this 9th day of August, 2010.




Notary Public in and for the State of Idaho
Residing at: Hayden, ID
My commission expires: 3-1-16

CERTIFICATE OF SERVICE

I certify that on this the 9th day of August, 2010, I caused a true and correct copy of the AFFIDAVIT OF EDWARD J. ANSON IN RESPONSE TO PLAINTIFF'S OBJECTION TO MERCEAS' MEMORANDUM OF COSTS AND ATTORNEY FEES to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
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Joe and Sue Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814
Pro Se

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☐ Hand Delivered
☐ Overnight Mail

Douglas S. Marfice
P.O. Box 1336
Coeur d'Alene, Idaho 83816

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Via Fax: (208) 664-5884


Tina Marie Bell

Exhibit A

Exhibit A

Edward J. Anson, I.S.B. No. 2074
WITHERSPOON, KELLEY,
DAVENPORT & TOOLE, P.S.
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
Telephone: (208) 667-4000
Facsimile: (208) 667-8470

Attorneys for Defendants Cornelius & Patricia Mercea

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHEAR and SUSAN M. LAMPHEAR,
husband and wife, FIRST AMERICAN TITLE
INSURANCE CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHEAR and SUSAN M.
LAMPHEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

DEFENDANTS' FIRST SET OF
INTERROGATORIES, REQUESTS FOR
ADMISSION AND REQUESTS FOR
PRODUCTION OF DOCUMENTS TO
PLAINTIFF

TO PLAINTIFF, DIANA JAMES and HER ATTORNEY JOHN P. WHELAN:

**DEFENDANTS' FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND
REQUESTS FOR PRODUCTION OF DOCUMENTS TO PLAINTIFF - 1**

Q:\CLIENTS-EJAMercea 56704\Discovery\Def's 1st Set of ROGS & RFP.doc

1 Pursuant to I.R.C.P. 26, 33, 34 and 36, Defendants Cornelius Mercea and Patricia
2 Mercea, (hereinafter "Mercea") herewith submit the following Interrogatories and Requests for
3 Production to be answered separately and fully under oath and signed by the person(s)
4 answering them within thirty (30) days from the date of service of said Interrogatories, Requests
5 for Admissions, and Requests for Production upon you.

7 The documents that are identified by Plaintiff to be responsive to these requests for
8 production are to be produced at the offices of Witherspoon, Kelley, Davenport & Toole, P.S.,
9 608 Northwest Boulevard, Suite 300, Coeur d'Alene, Idaho 83814. These Discovery requests
10 are continuing in nature and any document which come into your or your attorney's custody,
11 control or access hereafter which are responsive to these requests shall also be propounded to
12 counsel for Mercea.

14 INSTRUCTIONS

15 Pursuant to I.R.C.P. 33, 34 and 36 Mercea propounds the following Interrogatories,
16 Requests for Admissions, and Requests for Production to Diana James (hereinafter "Plaintiff").

18 **THESE REQUESTS AND INTERROGATORIES ARE CONTINUING IN**
19 **NATURE, AND MERCA HEREBY DEMANDS THAT ANY INFORMATION OR**
20 **DOCUMENT COMING INTO THE POSSESSION OF THE PLAINTIFF OR**
21 **PLAINTIFF'S COUNSEL THAT WOULD CHANGE THE ANSWERS IN ANY WAY BE**
22 **PROMPTLY FURNISHED TO MERCEAS' COUNSEL, IN ANY SUCH EVENT NO**
LATER THAN THIRTY (30) DAYS AFTER RECEIPT OF SUCH INFORMATION OR
DOCUMENTS.

23 MATTERS OF GENERAL APPLICATION AND DEFINITION

24 1. The answer to each interrogatory shall include such knowledge of Plaintiff as are
25 within her custody, possession, or control, including but not limited to, knowledge and
26 documents in here custody, possession or control or that of associated or related organizations or
27 that of those under common control, predecessors in interest, consultants, accountants, attorneys
28

1 and other agents. Where facts are set forth in answer or portions thereof are supplied upon
2 information and belief rather than actual knowledge, Plaintiff should so state and specifically
3 describe or identify the source or sources of such information and belief. Should Plaintiff be
4 unable to answer any interrogatory or portion thereof by either actual knowledge or upon
5 information or belief, describe her effort to obtain such information.
6

7 2. In response to such interrogatory, if Plaintiff does not answer the interrogatory in
8 whole or in part because she is unable to do so or otherwise, identify each person whom Plaintiff
9 believes have information regarding the subject interrogatory.
10

11 3. "Conversations," as used in these interrogatories, refer to any manner of oral
12 communication regardless of the medium by which such communication occurred.

13 4. As used herein, the term "document" means any writing and any other tangible
14 thing in custody, possession or control of Plaintiff or known to Plaintiff whether printed,
15 recorded, reproduced by any process, or written or produced by hand, and whether or not
16 claimed to be privileged or exempt from production for any reason, including, but not limited to,
17 letters, reports, agreements, communications (including intra-company communications),
18 correspondence, telegrams, memoranda, summaries of records of personal conversations,
19 diaries, forecasts, photographs, tape recordings, models, statistical statements, graphs, laboratory
20 and engineering reports and notebooks, charts, plans, drawings, minutes or records of
21 conferences, expressions or statements of policy, lists of persons attending meetings or
22 conferences, reports and/or summaries of interviews, reports and/or summaries of investigations,
23 opinions or reports of consultants, appraisals, records, reports or summaries of negotiations,
24 brochures, pamphlets, advertisements, circulars, trade letters, press releases, drafts of any
25 document, revisions of drafts of any document invoices, receipts and original or preliminary
26
27
28

1 notes. Any comment or notation appearing on any document, and not a part of the original text,
2 is to be considered a separate document.

3 The term "document" also includes, but is not limited to: any electronically stored data or
4 magnetic or optical storage media as an "active" file or files (readily readable to one or more
5 computer applications or forensic software) and "deleted" but recoverable electronic files on
6 said media; any electronic file fragments (files that have been deleted and partially overwritten
7 with new data); slack (data fragments stored randomly from random access memory on a hard
8 drive after new data has overwritten some but not all of previously stored data); emails;
9 webpages; word processing files; databases stored in memory of computers; palm-top devices;
10 magnetic disks (such as computer hard drives and floppy disks; optical disks (such as DVDs and
11 CDs); and flash memory (such as "thumb" or "flash" drives).

14 5. "Identify," as used in these interrogatories, means to describe and define with
15 particularity and precision.

17 6. "Persons," as used in these interrogatories refers to any individual or entity, such
18 as a corporation, partnership or other organization.

19 7. Where identification of a conversation is required, the following shall be
20 separately stated as to each communication: the date; the place at which it occurred or medium
21 involved; the person involved and their last address known to you and their business affiliations
22 at that time and presently; the substance of the communication; and the names and present
23 address of any other person who, though not present or involved, possess information
24 concerning the existence or nature of said communication.

26 8. Where identification of a document is required, state: the date, the exact title; the
27 general subject matter of the document; the name of the author; its business affiliation, present
28

1 and at the time of the document, the last known address of every person or organization to
2 whom a copy of the document was to be sent, other than the addressee described above; the
3 names and address of all persons who now have the originals and any copies identification and
4 locations of the files where the original and each copy is normally or presently kept and the
5 custodian thereof; and whether such document will be made available for inspection without a
6 motion to produce.
7

8 9. Whenever identification of a "person" is required, state the name and last known
9 business address or location of each such person. If such a person is not an individual but an
10 entity or organization, additionally identify the individual or individuals employed by or
11 representing such entity or organization who have knowledge or with whom communications
12 have been had, or relating to the matter involved.
13

14 10. If Plaintiff contends that the answers to any interrogatory is privileged in whole or
15 in part, or otherwise object to any part of any interrogatory, or that an identified document
16 would be excludable from production to Mercea in discovery regardless of its relevance, state
17 the reasons for each objection or ground for exclusion, and identify by title, subject matter and
18 date, the document withheld if any, and identify each person having knowledge of the factual
19 basis, if any, on which the privileged or other ground is asserted.
20
21

22 11. These interrogatories shall be deemed continuing in nature and any additional
23 information relating in any way to these interrogatories which Plaintiff acquires subsequent to
24 the date of answer these interrogatories and up to an including the time of trial shall be furnished
25 to Mercea promptly after such information is acquired, as supplemental to these interrogatories.
26

27 12. Words in the masculine gender shall include the feminine and neuter.

28 13. The singular number shall include the plural, and the plural the singular.

1 14. The conjunctive includes the disjunctive and vice versa.

2 15. "Produce" means to provide a copy of the document, information or thing as it
3 exists in the normal course of business to Plaintiff. If the document exists in hard copy, Mercea
4 request production of a copy of the document or information with associated OCR (optical
5 character recognition).
6

7 To the extent the document exists in both hard copy and electronic form Mercea requests
8 production of the document in each form ensuring that any metadata or embedded data is
9 maintained intact in electronic production. These requests expressly include any version, draft
10 or edits made to the information or document requested. If Plaintiff ordinarily maintains the
11 information she is producing in a way that makes it searchable by electronic means, the
12 information should not be produced in a form that removes or significantly degrades this feature.
13 Electronically stored information should, to the extent possible, be produced in its "native
14 format," that is, the form in which the information was created and is used in the normal course
15 of operations.
16
17

18 16. "Mercea" refers to CORNELIUS MERCEA and PATRICIA MERCEA.

19 17. "You" refers to DIANA JAMES.
20

21 **INTERROGATORIES, REQUESTS FOR ADMISSION**

22 **AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

23 **INTERROGATORY NO. 1:** Identify all persons involved in answering these
24 Interrogatories, Requests for Admission and Requests for Production.

25 **ANSWER:**
26
27
28

1 **INTERROGATORY NO. 2:** Identify each person known to you who may have
2 knowledge of the facts and circumstances material to this case, describing in detail the subject
3 matter of which each person is believed to have knowledge.
4

5 **ANSWER:**
6

7 **INTERROGATORY NO. 3:** Identify by listing the name, address and phone number
8 of each person identified in your response to Interrogatory No. 2, above.
9

10 **ANSWER:**
11

12 **INTERROGATORY NO. 4:** Identify all documents that you will or may seek to
13 introduce into evidence at the trial on this matter.
14

15 **ANSWER:**
16

17 **REQUEST FOR PRODUCTION NO. 1:** Please produce all documents identified in
18 your Answer to Interrogatory No. 4, above.
19

20 **RESPONSE:**
21

22 **INTERROGATORY NO. 5:** Please set forth the name and address and telephone
23 number of each expert witness that you intend to call to testify in this matter and for each
24 witness, set forth the following:

25 A complete statement of all opinions to be expressed and the basis
26 and reasons therefore; the data or other information considered by
27 the witness in forming the opinions; any exhibits to be used as a
28 summary of or support for the opinions; any qualifications of the
 witness, including a list of all publications authored by the witness

1 within the preceding ten years; the compensation to be paid for the
2 testimony; and a listing of any other cases in which the witness has
3 testified as an expert at trial or by deposition within the preceding
4 four years.

5 **ANSWER:**

6
7 **REQUEST FOR PRODUCTION NO. 2:** Please produce all reports related to this case
8 created by anyone identified in your Answer to Interrogatory No. 5, above.

9 **RESPONSE:**

10
11
12 **REQUEST FOR ADMISSION NO. 1:** Admit that the real property subject to this
13 action is Lot 2, Block 1, Cherry Heights, according to the Plat recorded in the office of the
14 county recorder in Book E of Plats, Page 9, records of Kootenai County, Idaho.

15 **RESPONSE:**

16
17 **REQUEST FOR ADMISSION NO. 2:** Admit that the Plat was filed and recorded on
18 October 20, 1964.

19 **RESPONSE:**

20
21 **REQUEST FOR ADMISSION NO. 3:** Admit that a true and correct copy of the Plat
22 as described above is attached hereto as Exhibit "A" and by this reference incorporated herein.

23 **RESPONSE:**

24
25 **REQUEST FOR ADMISSION NO. 4:** Admit that the Plat clearly depicts the
26 boundaries of the subject real property.

27 **RESPONSE:**

1 **REQUEST FOR ADMISSION NO. 5:** Admit that the Plat contains a metes and

2 bounds description of Lot 2 as follows:

3 Beginning at the section Corner at the junction of 15th Street and
4 Harrison Avenue; thence Easterly along the section line between
5 sections 7 and 18, T.50N., R.3W. B.M. a distance of 814.0 feet,
6 more or less, to a concrete monument on the east side of U.S.
7 Highway No. 10; thence S. 33°-50'E. along the east side of U.S.
8 Highway No. 10, 673.6 feet to the Northwest Corner of Lot 2 and
9 the Point of Beginning; thence N. 56°-10'E., 120.0 feet; thence S.
10 33°-50'E, 36.02 feet; thence S. 0°-44'E., 76.37 feet; thence S. 56°-
11 10'W., 78.3 feet; thence N. 33°-50'W, 100.0 feet to Point of
12 Beginning located in Coeur d'Alene, Kootenai County, Idaho.

10 **RESPONSE:**

11
12 **REQUEST FOR ADMISSION NO. 6:** Admit that you purchased and obtained from

13 Mercea, Lot 2 with the boundaries as described above.

14 **RESPONSE:**

15
16 **REQUEST FOR ADMISSION NO. 7:** Admit that the Plat clearly depicts a public

17 easement or right-of-way lying east of the subject property.

18 **RESPONSE:**

19
20 **REQUEST FOR ADMISSION NO. 8:** Admit that the subject real property contains a

21 driveway which connects the subject real property to the public easement or right-of-way which
22 in turn connects to Crestline Drive.

23 **RESPONSE:**

24
25 **REQUEST FOR ADMISSION NO. 9:** Admit that there are no conditions that effect

26 clear title to you to the subject property.

27 **RESPONSE:**

1
2 **REQUEST FOR ADMISSION NO. 10:** Admit that at the time you entered into the
3 Purchase and Sale Agreement with Mercea for the subject property the boundary corners of the
4 subject property where clearly marked.

5 **RESPONSE:**
6

7 **REQUEST FOR ADMISSION NO. 11:** Admit that at the time you entered into the
8 Purchase and Sale Agreement with Mercea for the subject real property the fact that the public
9 easement or right-of-way was used to provide access to both Lot 2, Lot 3, and that portion of Lot
10 1, Cherry Heights First Addition located across the public easement or right-of-way from the
11 subject property was clearly evident.

12 **RESPONSE:**
13

14 **REQUEST FOR ADMISSION NO. 12:** Admit that at the time you entered into the
15 Purchase and Sale Agreement with Mercea for the subject real property a portion of Lot 1,
16 Cherry Heights First Edition, located across the public easement or right-of-way from the
17 subject property was being used by the owner of said Lot 1 to store personal property.

18 **RESPONSE:**
19

20 **REQUEST FOR ADMISSION NO. 13:** Admit that at the time you entered into the
21 Purchase and Sale Agreement with Mercea for the subject real property that the portion of Lot 1,
22 Cherry Heights First Edition located across the public easement of right-of-way from the subject
23 property was fenced with a gate providing access to the public easement or right-of-way and
24 was further improved with two sheds.

25 **RESPONSE:**
26
27
28

1 **REQUEST FOR ADMISSION NO. 14:** Admit that that at the time you entered into
2 the Purchase and Sale Agreement with Mercea for the subject real property a driveway servicing
3 Lot 3, Block 1, Cherry Heights ran from the public easement or right-of-way.

4 **RESPONSE:**

5
6 **REQUEST FOR ADMISSION NO. 15:** Admit that you inspected the subject property
7 prior to executing the Purchase and Sale Agreement.

8
9 **RESPONSE:**

10
11
12 **REQUEST FOR ADMISSION NO. 16:** Admit that cumulatively attached as Exhibit
13 "2" to Merceas' Answer and Crossclaim are twelve (12) photographs which accurately depicts
14 that which is depicted in them and as described in Paragraph VIII of the said Answer and
15 Crossclaim.

16 **RESPONSE:**

17
18 **REQUEST FOR ADMISSION NO. 17:** Admit that the photographs cumulatively
19 attached as Exhibit "3" to the Answer of Joe and Sue Lamphiear accurately depicts that which is
20 described in said Exhibit.

21 **RESPONSE:**

22
23 **REQUEST FOR ADMISSION NO. 18:** Admit that at the time you purchased the
24 subject real property, it was obvious that other property utilized the public easement or right-of-
25 way as depicted on the Plat attached hereto as Exhibit "A".

26 **RESPONSE:**

1 **REQUEST FOR ADMISSION NO. 19:** Admit that the photograph furnished to you
2 by First American Title Company, and attached hereto as Exhibit "B" shows that what you call
3 the driveway is actually a public easement and is not located entirely on the subject real
4 property.

5 **RESPONSE:**
6
7

8 **REQUEST FOR ADMISSION NO. 20:** Admit that you received the photograph
9 attached hereto as Exhibit "B" after entering into the Purchase and Sale Agreement with Mercea.

10 **RESPONSE:**
11
12

13 **REQUEST FOR ADMISSION NO. 21:** Admit that you received the photograph
14 attached hereto as Exhibit "B" after the closing of the Purchase and Sale Agreement between
15 yourself and Mercea.

16 **RESPONSE:**
17

18 **INTERROGATORY NO. 6:** If you denied any of the Requests for Admissions above,
19 then please identify by number each Request for Admission denied and describe in detail every
20 factual basis and document upon which you rely for denying said Request for Admission.

21 **ANSWER:**
22

23 **REQUEST FOR PRODUCTION NO. 3:** Please produce any documents identified
24 and/or relied upon in your Answer to Interrogatory No. 6, above.

25 **RESPONSE:**
26
27
28

1 **INTERROGATORY NO. 7:** Please identify and describe in detail the nature by which
2 you allege in your Complaint that "The disclosure form recited that there were no conditions that
3 might affect the ability of Defendants Mercea to provide clear title to the home. Unbeknown to
4 Plaintiff, the representation was, in fact, false".

5 **ANSWER:**

6
7 **REQUEST FOR PRODUCTION NO. 4:** Please produce any documents identified
8 and/or relied upon in your Answer to Interrogatory No. 7, above.

9 **RESPONSE:**

10
11 **REQUEST FOR PRODUCTION NO. 5:** Please produce any and all documents
12 provided to you from First American Title Company in connection with your purchase of the
13 subject real property, including but not limited to any preliminary reports, photographs, maps,
14 diagrams, graphs, drawings, surveys, receipts and any title policies.

15 **RESPONSE:**

16
17 **INTERROGATORY NO. 8:** Please describe in detail the current condition of the
18 driveway/public easement as referred to in paragraph 11 of the Complaint, including, but not
19 limited to, its width and whether it is generally improved, graveled, paved or dirt.
20

21 **ANSWER:**

22
23 **REQUEST FOR PRODUCTION NO. 6:** Please produce any documents identified
24 and/or relied upon in your Answer to Interrogatory No. 8, above.
25

26 **RESPONSE:**

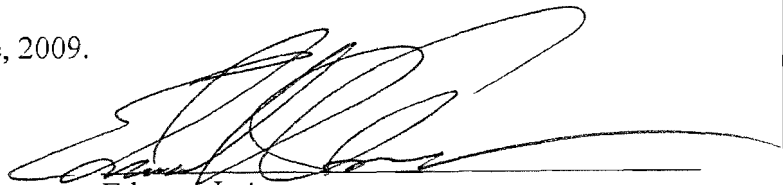
1 **REQUEST FOR PRODUCTION NO. 7:** Please produce any and all pictures of the
2 driveway/public easement as referred to in paragraph 11 of the Complaint.

3 **RESPONSE:**

4
5
6 **REQUEST FOR PRODUCTION NO. 8:** Please produce any and all maps, graphs,
7 drawings, surveys, receipts, and other documents related to the driveway/public easement.

8 **RESPONSE:**

9
10 DATED this 18 day of June, 2009.



11 Edward J. Anson
12 Witherspoon, Kelley, Davenport & Toole, P.S.
13 The Spokesman Review Building
14 608 Northwest Boulevard, Suite 300
15 Coeur d'Alene, Idaho 83814
16 (208) 667-4000
17 *Attorneys for Defendants Mercea*

CERTIFICATE OF SERVICE

I certify that on this the 18 day of June 2009, I caused a true and correct copy of DEFENDANTS FIRST SET OF INTERROGATORIES, REQUESTS FOR ADMISSION AND REQUESTS FOR PRODUCTION OF DOCUMENTS ON PLAINTIFF to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile: (208) 664-2240

Counsel for Plaintiff

John K. Olson
Hawley Troxell
877 W Main Street, Suite 1000
P.O. Box 1617
Boise, Idaho 83701-1617

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile: (208) 342-3829

Counsel for First American Title Company

Joe and Sue Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814

☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile:

Pro Se



April Gibson

EXHIBIT A

EXHIBIT A

EXHIBIT A

EXHIBIT A

2000



THIS SKETCH IS FURNISHED WITHOUT
CHARGE SOLELY FOR THE PURPOSE OF
ASSISTING IN LOCATING SAID PREMISES -
AND THE FIRST AMERICAN TITLE COMPANY
ASSUMES NO LIABILITY FOR INACCURACIES
THEREIN.

SECRET

一、關於「中國共產黨」
 二、關於「中國革命」
 三、關於「中國前途」
 四、關於「中國青年」
 五、關於「中國婦女」
 六、關於「中國兒童」
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 一百四十一、關於「中國對外對外對外歷史」
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 一百八十六、關於「中國對內對外對外對外地理」
 一百八十七、關於「中國對外對外對外對外氣候」
 一百八十八、關於「中國對

STATE OF TEXAS

County of Mendocino

On the 15 day of August 1988 before me, personally present, the undersigned, a Notary Public in and for the State of California, did appear _____, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 15th day of August 1988.

Notary Public in and for the State of California

My Commission Expires _____

COUNTY SURVEYORS CERTIFICATE

any [unclear], County Treasurer, Baltimore (County) Clerk

CITY COUNCIL APPROVAL

[Signature]

County Conditions are equal
No real estate taxes and no
county. State of New York
County of Westchester

County Treasurer

COUNTY HEALTH OFFICE
This report prepared by me under contract No. 10-67-
and filed in the files of the County Health Officer.

Wm. J. [Signature]
County Health Officer

COUNTY RECORDS

1983
LIVING

STATE OF OHIO
County of _____ ss.
I, _____, Clerk of the Court of Common Pleas for and in said County, do hereby certify that the foregoing is a true and correct copy of the original of the same as the same appears from the records of said Court.

[illegible]

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Social Skills

[Faint vertical bleed-through from reverse side]

William A. Bradford

100

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B



First American Title Company
1806 N. Lakewood Drive
Coeur d'Alene, ID 83814
Phone: 208-667-0567
Fax: 208-667-0832

STATE OF IDAHO
 COUNTY OF KOOTENAI
 9/3/09
 1:35 PM
 DISTRICT COURT
 DEPUTY

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI**

DIANA JAMES, an individual,)
)
)
 Plaintiff,)
)
 vs.)
)
 CORNELIUS and PATRICIA MERCEA,)
 husband and wife, JOE and SUSAN)
 LAMPHEAR, husband and wife,)
 FIRST AMERICAN TITLE INSURANCE)
 COMPANY,)
)
 Defendants.)

CASE NO. CV-09-0992

MEMORANDUM OPINION
 AND ORDER RE: PLAINTIFF'S
 MOTION TO VACATE JUDGMENT /
 RECONSIDERATION AND
 MERCEAS' MOTION TO DETERMINE
 ATTORNEY FEES AND COSTS AND
 PLAINTIFF'S MOTION TO DISALLOW
 COSTS AND ATTORNEY FEES

CORNELIUS and PATRICIA MERCEA,)
 husband and wife,)
)
 Crossclaimants,)
)
 vs.)
)
 JOE and SUSAN LAMPHEAR,)
 husband and wife,)
)
 Crossdefendants.)

The Lamphiears built a home and paved a driveway to the home and paved an adjacent right of way that provided access to an adjacent undeveloped lot also owned by the Lamphiears. The Merceas purchased the home and driveway. James purchased the home and driveway from the Merceas. James later realized that she did not own the adjacent right of way. James sought rescission, restitution, damages, and a declaratory judgment.

John P. Whelan, JOHN P. WHELAN, P.C., attorney for Plaintiff.

Edward Anson, WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S., attorney for Defendants Mercea.

Joe and Susan Lamphiear, Pro Se

Douglas F. Marfice, RAMSDEN & LYONS, LLP, attorney for Defendant First American Title Insurance Company.

I. FACTUAL AND PROCEDURAL BACKGROUND

The findings of facts and conclusions of law are set forth in this Court's April 5, 2010, "Order Re: Merceas' Motion for Summary Judgment" ("Order") and June 25, 2010, "Decision: Motion for Summary Judgment (Reconsideration)" ("Decision"). This Court dismissed the Plaintiff's claims against the Merceas in the Order and the Decision, and then dismissed the Merceas' crossclaims against the Lamphiears on July 9, 2010. The Plaintiff's claims against First American Title Insurance Company remain.

On July 6, 2010, the Merceas submitted an "Affidavit and Memorandum of Costs and Attorney Fees" ("Attorney Fee Memorandum"). On July 9, 2010, this Court entered a "Final Judgment Dismissing Plaintiff's Complaint as Against Defendants Mercea" ("Final Judgment").

Subsequently, on July 20, 2010, the Plaintiff filed the following documents: "Motion to Vacate Judgment / Reconsideration" ("Motion to Reconsider"); "Memorandum in Support of Plaintiff's Motion to Vacate Judgment / Reconsideration" ("Reconsideration Memorandum"); "Affidavit of Diana James in Support of Plaintiff's Motion to Vacate Judgment / Reconsideration" ("James Affidavit"). The Plaintiff also objected to the Merceas' Attorney Fee Memorandum by filing the following documents: "Motion to Disallow Costs and Attorney Fees" ("Motion to Disallow"); "Memorandum in

Support of Plaintiff's Objections to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs" ("Objection Memorandum"); and "Affidavit of John P. Whelan in Support of Plaintiff's Objections to Memorandum of Costs and Attorney Fees and Motion to Disallow Costs" ("Whelan Affidavit").

The Merceas responded by submitting a "Motion to Determine Attorney Fees and Costs and Notice of Hearing" ("Motion to Determine") on August 5, 2010, and an "Affidavit of Edward J. Anson Re: Attorney Fees" ("First Anson Affidavit"). The Merceas also responded to the Plaintiff's Motion to Reconsider by submitting a "Response to Plaintiff's Motion to Vacate Judgment / Reconsideration" ("Response to Motion to Reconsider") and "Second Joint Affidavit of Cornelius Mercea and Patricia Mercea" ("Mercea Affidavit"). Also, the Merceas filed an "Affidavit of Edward J. Anson in Response to Plaintiff's Objection to Merceas' Memorandum of Costs and Attorney's Fees" ("Second Anson Affidavit").

This Court held a hearing on all the pending motions on August 19, 2010, and heard arguments from both of the parties before taking all the matters under advisement.

II. PLAINTIFF'S MOTION TO VACATE / RECONSIDER

A. Idaho Rules of Civil Procedure 11(a)(2)(B) and 59(e) Govern the Plaintiff's Motion to Reconsider

It is clear from the Plaintiff's Motion to Reconsider and Reconsideration Memorandum that the Plaintiff desires this Court to reconsider its June 25, 2010, Decision and July 9, 2010, Final Judgment. However, the Plaintiff cites to multiple Idaho Rules of Civil Procedure as the basis of her motion. This Court, therefore, must first determine the rules that govern the Plaintiff's Motion to Reconsider.

The Plaintiff cites to I.R.C.P 52(b) which allows for a party to move to amend a trial court's findings or conclusions within fourteen (14) days after entry of judgment, "when findings of fact are made in actions tried by the court without a jury." By its plain language, Rule 52(b) only applies where a court trial has occurred. In this case, no court trial occurred. Thus, Rule 52(b) cannot govern the Plaintiff's Motion to Reconsider.

The Plaintiff also looks to I.R.C.P. 60(b)(6) which allows a court to "relieve a party . . . from a final judgment, order or proceeding for . . . (6) any other reason justifying relief from the operation of the judgment." However, a court may not reconsider the legal basis for a decision under this rule. First Bank and Trust v. Parker Brothers, 112 Idaho 30, 730 P.3d 50 (1986). The Plaintiff has requested that this Court revisit the legal basis for the June 25, 2010, Decision. Because this Court cannot revisit the legal basis for the June 25, 2010, Decision under Rule 60(b)(6), the rule is not applicable.

The Plaintiff also cites to I.R.C.P. 11(a)(2)(B) in support of her Motion to Reconsider. This rule provides that a party may seek reconsideration of an "interlocutory order" of the trial court within fourteen (14) days of entry of a final judgment. The Plaintiff has also asserted that I.R.C.P. 59(e) governs her Motion to Reconsider because it allows a party to move to alter or amend a "judgment" within fourteen (14) days after entry. The Plaintiff's Motion to Reconsider is timely under both Rule 11(a)(2)(B) and Rule 59(e) because Court's Decision was entered on July 25, 2010, and the Final Judgment was entered on July 9, 2010, and the Plaintiff filed her Motion to Reconsider within fourteen (14) days on July 20, 2010.

Case law shows that motions for reconsideration are frequently brought under both Rule 11(a)(2)(B) and Rule 59(e) because these rules allow the moving party to ask

for reconsideration of the legal conclusions and factual findings of an interlocutory order and reconsideration of the final judgment. See Coeur d'Alene Mining Co. v. First National Bank of North Idaho, 118 Idaho 812, 822-824, 800 P.2d 1026, 1036-1037 (1990) (where the movant sought reconsideration of an order granting summary judgment prior to trial, and the final judgment entered after trial, under both Rule 11(a)(2)(B) and Rule 59(e)); Idaho First National Bank v. David Steed and Associates, Inc., 121 Idaho 356, 361, 825 P.2d 79, 84 (1991) (where movant sought reconsideration of an order granting summary judgment and a final judgment under Rules 11(a)(2)(B) and 59(e)); Slaathaugh v. Allstate Ins. Co., 132 Idaho 705, 979 P.2d 107 (1999) (holding that Rule 59(e) provides a mechanism to correct legal and factual errors occurring in the proceedings before it). Recognizing that granting or denying a motion for reconsideration under either rule is a discretionary decision, this Court, then, will consider the Plaintiff's Motion to Reconsider under both Rule 11(a)(2)(B) and Rule 59(e).

B. The Plaintiff Has Not Shown a Legal Error Exists in the Decision or the Final Judgment

This Court denied summary judgment to the Merceas on the Plaintiff's claim of constructive fraud because there was a "contested issue of material fact [] as to whether or not the Merceas were under a duty to disclose to Plaintiff that what appeared to her to be her driveway was in fact a predominately public easement." *Order Re: Merceas' Motion for Summary Judgment*, p.4, (April 5, 2010).

The Merceas thereafter asked this Court to reconsider its ruling "regarding the presence of a contested factual issue regarding the duty to disclose information regarding the driveway." *Decision: Motion for Summary Judgment (Reconsideration)*,

p.4, (June 25, 2010). Specifically, the Merceas pointed out that whether there was a duty to make a disclosure regarding the ownership of the right of way is a question of law, not a question of fact. *Decision* at 4. This Court reconsidered the April 5, 2010 Order and looked to the undisputed facts that 1) the legal description in the "Real Estate Purchase and Sale Agreement" accurately reflected the Lamphiears' ownership of the right of way; 2) the plat map shows the presence of the right of way on the adjacent lot; 3) visual inspection of the property reveals the access to the adjacent lot from the right of way; and 4) there is no evidence that the Merceas knew that the Plaintiff did not know about the right of way location. *Id.* at 9-10. Because these facts were undisputed, this Court concluded that there was no genuine issue of material fact remaining. *Id.* at 10. As a result, this Court entered judgment as a matter of law because the Plaintiff did not show the Merceas had a legal duty to disclose to the Plaintiff the existence of a right of way on an adjacent parcel of property. *Id.* at 10.

In her Motion to Reconsider and Reconsideration Memorandum, the Plaintiff argues that this Court should reconsider the Decision because "the Court first found a duty to disclose and then reversed itself when presented with the Merceas' motion for reconsideration." *Memorandum in Support of Plaintiff's Motion to Vacate Judgment / Reconsideration*, p. 3, (July 20, 2010). The Plaintiff, however, does not show where in the April 5, 2010, Order this Court concluded that a legal duty exists. Instead, this Court stated that there may be an issue of fact as to whether a duty exists (*Order*, p. 2) and but then determined that whether a duty exists is a question of law (*Decision*, p. 10).

The Plaintiff again argues that there is a duty to disclose created by the "Property Disclosure Form" that is required by I.C. § 55-2508 and that Bethlamy v. Bechtel, 91

Idaho 55, 415 P.2d 698 (1966), creates legal duty to disclose the defective conditions of the property. The Plaintiff made these same arguments in her February 4, 2010, "Opposition of Plaintiffs to Motion for Summary Judgment of Defendants Merceas."

The Merceas respond that the Plaintiff has failed to show as a matter of law that the Merceas owed any duty to the Plaintiff to disclose the existence of the right of way on the adjacent parcel or that the Merceas knew that the Plaintiff was ignorant of the location of the right of way. *Response to Plaintiff's Motion to Vacate Judgment / Reconsideration*, pp.2-3 (August 6, 2010). The Merceas also point out that this Court has previously found that clear title passed to the Plaintiff because the right of way was located on the adjacent parcel of property. *Order*, p.4.

This Court agrees with the Merceas. While the Plaintiff may have made factual inferences in her complaint that the Merceas had duty to disclose the location of the right of way, the existence of the duty to disclose is a question of law. At no time has the Plaintiff demonstrated that the Merceas had a legal duty to disclose the existence of a right of way located on an adjacent parcel. Additionally, the Plaintiff provided no evidence that the Merceas were aware that the Plaintiff was ignorant of the location of the right of way. On the contrary, the undisputed facts demonstrate that the "Real Estate Purchase and Sale Agreement" contained the correct legal description of the property and the plat showed the right of way was located on an adjacent parcel.

Recognizing that its decision under Rule 11(a)(2)(B) and Rule 59(e) is discretionary, this Court concludes that the Plaintiff has failed to show any error in the June 25, 2010, Decision or Final Judgment. Therefore, the Plaintiff's Motion to Reconsider is denied.

III. THE MERCEAS' MOTION TO DETERMINE ATTORNEY FEES AND COSTS AND PLAINTIFF'S MOTION TO DISALLOW COSTS AND ATTORNEY FEES

According to Rule 54(d)(5),

anytime after . . . a decision of the court, any party who claims costs may file and serve on adverse parties a memorandum of costs, itemizing each claimed expense, but it . . . may not be filed later than fourteen (14) days after entry of judgment . . . A memorandum prematurely filed shall be considered timely.

Rule 54(e)(5) states that "attorneys fees, when allowable by statute or contract, shall be deemed as costs in an action and processed in the same manner as costs and included in the memorandum of costs."

A. The Merceas are Proper Parties for an Award of Attorney Fees and Costs and There is an Underlying Basis.

The Merceas claim attorney fees and costs pursuant to a contract, and therefore this Court will look to the express provisions of the contract. Paragraph 25 of the "Real Estate and Purchase and Sale Agreement," ("Agreement") states:

25. ATTORNEY'S FEES: If either party initiates or defends any arbitration or legal action or proceedings which are in any way connected with this Agreement the prevailing party shall be entitled to recover from the unprevailing party reasonable costs and attorney's fees, including such costs and fees on appeal.

Exhibit B, Joint Affidavit of Cornelius Mercea and Patricia Mercea in Support of Motion for Summary Judgment (December 1, 2009). By the express terms of the Agreement the Merceas are a proper party for the award of attorney fees and costs because the Merceas and James were a party to the Agreement. Also, paragraph 25 creates an underlying basis for an award of attorney fees and costs because by the express terms it allows for such an award.

The Plaintiff argues that the Merceas' Attorney Fee Memorandum lacks any stated basis for awarding costs and fees. It is true that the Attorney Fee Memorandum does not state a basis for awarding costs and fees, but Rule 54(d)(5) and Rule 54(e)(1) do not require any such statement. The Merceas, however, specifically cite to Rule 54 and paragraph 25 of the Agreement in their Motion to Determine. The Plaintiff also objects that the Merceas' Attorney Fee Memorandum is not an underlying basis for an award of fees because it lacks documentation as required by I.R.C.P. 54(e)(5). However, the Attorney Fee Memorandum and the accompanying affidavits are properly notarized with itemizations of costs and attorney fees attached. Thus, the Plaintiff's objections are noted, but given the record, this Court concludes there is an underlying basis for attorney fees and costs.

B. All the Requirements for Attorney's Fees and Costs are Met.

Attorney fees can be awarded by the trial court when provided for by contract. Thomas v. Arkoosh Produce, Inc., 137 Idaho 352, 361, 48 P.3d 1241, 1250 (2002). However, the underlying action must be brought under the contract or to enforce terms of the contract for attorney fees to be awarded. Lane Ranch Partnership v. City of Sun Valley, 144 Idaho 584, 591-92, 166 P.3d 374, 381-82 (2007). The trial court must first interpret the contract to determine if attorney fees are appropriate before making the discretionary determination as to who is the prevailing party. Thieme v. Worst, 113 Idaho 455, 461, 745 P.2d 1076, 1082 (Ct. App. 1987). The express provisions of the Agreement provide for attorney fees and costs in any action brought under the Agreement. The Plaintiff's claims were brought under the Agreement. As a result, all the requirements for attorney fees and costs under the contract have been met.

C. The Merceas are the Prevailing Party.

Rule 54(d)(1) provides that “costs shall be allowed as a matter of right to the prevailing party or parties, unless otherwise ordered by the court.” Rule 54(e)(1) allows that, “in any civil action the court may award reasonable attorney fees, . . . , to the prevailing party or parties as defined in Rule 54(d)(1)(B).” The Agreement specifically states that the “prevailing party shall be entitled to recover” attorney fees and costs. Rule 54(d)(1)(B) is used to determine a prevailing party in a request for attorney fees and costs pursuant to contract. Chadderdon v. King, 104 Idaho 406, 411–12, 659 P.2d 160, 165–66 (Ct. App. 1983). Under Rule 54(d)(1)(B), the trial court should consider the “final judgment or result of the action in relation to the relief sought by the respective parties.” In making this determination the trial judge has an abundance of discretion and the ruling will not be reversed by an appellate court in the absence of an abuse of that discretion. Shore v. Peterson, 146 Idaho 903, 914, 204 P.3d 1114, 1125 (2009).

The Plaintiff sued the Merceas under multiple theories, and in looking at the Final Judgment and Decision, it is clear that the Merceas prevailed on each and every claim and that the Plaintiff received none of the relief prayed for. Recognizing that its decision is one of discretion, this Court concludes that the Merceas are the prevailing party.

D. Attorney Fees and Costs are Awarded to the Merceas

1. Costs

Under Rule 54(d)(1)(C), certain costs are awarded as a matter of right. The Merceas have itemized costs as a matter of right in the Attorney Fee Memorandum. This Court hereby grants the \$72.00 filing fee as a cost as a matter of right.

Additional items may be allowed "upon a showing that said costs were necessary and exceptional costs reasonably incurred," but this Court must make "express findings as to why such specific items of discretionary costs should or should not be allowed." I.R.C.P. 54(d)(1)(C) and (D). The Merceas claim as discretionary costs appraisal fees, deposition transcript fees, and computer assisted research fees, and provide reasons for why these discretionary costs are necessary and exceptional. While the discretionary costs may be necessary and even reasonable, this Court is not persuaded that these costs are "exceptional." It is expected that the Merceas would need an accurate value of the subject real property in order to defend themselves against the Plaintiff's claims, and computer assisted research and depositions are similar costs expected to be incurred when gathering evidence in one's defense. Thus, because these discretionary costs are not exceptional, the discretionary costs are disallowed and the Plaintiff's Motion to Disallow is granted as to discretionary costs.

2. Attorney Fees


Rule 54(e)(3) is used in determining the amount of reasonable attorney fees claimed pursuant to contract. Bank of Idaho v. Colley, 103 Idaho 320, 326, 647 P.2d 776, 782 (Ct. App. 1982). It is well established that a determination of reasonable attorney fees is within the sound discretion of the trial court. Sun Valley Potato Growers v. Texas Refinery, 139 Idaho 761, 769, 86 P.3d 475, 483 (2004). "The time and labor actually required, however, is not the 'be all, end all' of the attorney fee question.... A court is permitted to examine the reasonableness of the time and labor expended . . . and need not blindly accept the figures advanced by the attorney." Id. at 705-06.

The Merceas claim \$32,813.00 in attorney fees. The Plaintiff objects that the fees are unreasonable, excessive, and do not reflect the going rate for attorneys of comparable skill and experience in the area. Recognizing that determining reasonable attorney fees is within the sound discretion of the trial court, and that paragraph 25 does not limit the attorney fees that may be awarded, but does not provide that actual attorney fees should be awarded either, and after reviewing the factors set forth in Rule 54(e)(3), as well as the pleadings and arguments of the parties, this Court determines that the Merceas are entitled to reasonable attorney fees in the amount of \$28,000.

III. CONCLUSION

Based on the foregoing, it is hereby ORDERED that the Plaintiff's Motion to Reconsider be and the same is hereby DENIED. It is further ORDERED that the Merceas Motion to Determine Attorney Fees and Costs is GRANTED and the Plaintiff's Motion to Disallow is GRANTED as to the discretionary costs claimed by the Merceas, but DENIED as to costs as a matter of right and attorney fees. It is further ORDERED that the Plaintiff shall pay to the Merceas costs as a matter of right in the amount of \$72.00. It is further ORDERED that the Plaintiff shall pay to the Merceas attorney fees in the amount of \$28,000.

DATED this 31st day of August, 2010



John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER RE: PLAINTIFF'S MOTION TO VACATE JUDGMENT / RECONSIDERATION AND MERCEAS' MOTION TO DETERMINE ATTORNEY FEES AND COSTS AND PLAINTIFF'S MOTION TO DISALLOW COSTS AND ATTORNEY FEES, was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 30 day of August, 2010, to the following:

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John P. Whelan, P.C.
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Edward J. Anson
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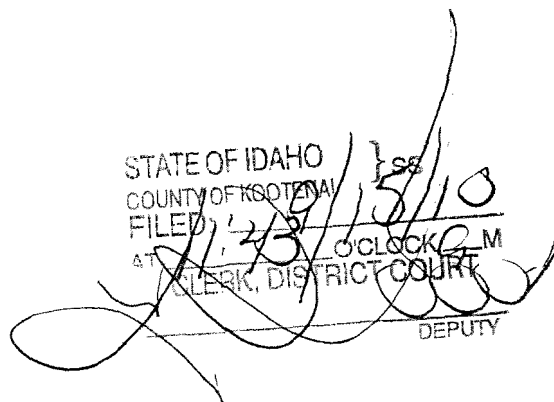
DANIEL J. ENGLISH
Clerk of the District Court

By: 

Deputy Clerk

#361

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*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M. LAMPHIEAR,
husband and wife, FIRST AMERICAN TITLE
CO.,

Defendants.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife,

Crossclaimants,

vs.

JOE A. LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife,

Crossdefendants.

NO. CV-09-992

SUPPLEMENTAL FINAL JUDGMENT
DISMISSING PLAINTIFF'S
COMPLAINT AS AGAINST
DEFENDANTS MERCEA AND
AWARDING ATTORNEY FEES
AND COSTS



1 This matter came on for hearing on August 19, 2010 upon the Plaintiff's Motion for
2 Reconsideration of this Court's June 25, 2010 decision and July 9, 2010 final judgment and
3 upon the Defendant Mercea's Motion to Determine Attorney Fees and Costs. This Court,
4 having heard the arguments of counsel and of the parties, having reviewed the records and files
5 herein, having been fully advised in the premises and having entered its written decision on
6 August 31, 2010,

8 NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED
9 that the Defendants Merceas are hereby granted summary judgment dismissing in its entirety
10 the Complaint of the Plaintiff as against the Merceas with prejudice.

12 IT IS FURTHER ORDERED, ADUDGED, AND DECREED that the Defendant
13 Merceas are awarded judgment against the Plaintiff in the sum of \$28,000.00 for an award of
14 attorney fees and \$72.00 as an award of costs as a matter of right, for a total judgment awarded
15 in favor of the Merceas and against the Plaintiff in the sum of \$28,072.00.

17 DATED this 15th day of September, 2010.

18 

19 John Patrick Luster,
20 District Judge

21 RULE 54(b) CERTIFICATE

22 With respect to the issues determined by the above judgment or order it is hereby
23 CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is
24 no just reason for delay of the entry of a final judgment and that the court has and does hereby
25 direct that the above judgment or order shall be a final judgment upon which execution may
issue and an appeal may be taken as provided by the Idaho Appellate Rules.

26 DATED this 15th day of September, 2010.

27 

28 John Patrick Luster,
District Judge

CLERK'S CERTIFICATE OF SERVICE

I certify that on this the 15th day of September, 2010, I caused a true and correct copy of SUPPLEMENTAL FINAL JUDGMENT DISMISSING PLAINTIFF'S COMPLAINT AS AGAINST DEFENDANTS MERCEA AND AWARDING ATTORNEY FEES AND COSTS to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following person(s):

John P. Whelan, P.C.
Attorney at Law
213 N. 4th Street
Coeur d'Alene, Idaho 83814
Counsel for Plaintiff

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile: (208) 664-2240

Joe and Sue Lamphiear
1021 Crestline Drive
Coeur d'Alene, Idaho 83814
Pro Se

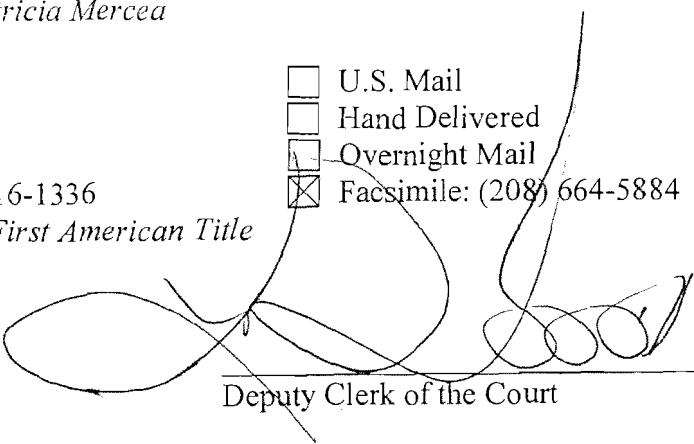
☒ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail

Edward J. Anson
WITHERSPOON KELLEY
The Spokesman Review Building
608 Northwest Blvd., Suite 300
Coeur d'Alene, Idaho 83814-2146
*Attorneys for Defendants
Cornelius Mercea and Patricia Mercea*

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile: (208) 667-8470

Douglas S. Marfice
Ramsden & Lyons, LLP
P.O. Box 1336
Coeur d'Alene, Idaho 83816-1336
*Attorneys for Defendant First American Title
Company, Inc.*

☐ U.S. Mail
☐ Hand Delivered
☐ Overnight Mail
☒ Facsimile: (208) 664-5884


Deputy Clerk of the Court



JOHN P. WHELAN, P.C.
213 N. 4th Street
Coeur d' Alene, ID 83814
Tele.: (208) 664-5891
Fax: (208) 664-2240
ISB# 6083

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED 43779

2010 OCT -7 PM 12:12

CLERK DISTRICT COURT
Bea H. Fisher
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

DIANA JAMES,

Plaintiff,

vs.

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, JOE A.
LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife, FIRST
AMERICAN TITLE INSURANCE CO.,
FIRST AMERICAN TITLE COMPANY,
INC.

Defendants.

CASE NO. CV-09-992

NOTICE OF APPEAL

TO: The above-named Defendants, Cornelius Mercea and Patricia Mercea, and
their attorney of record, Edward Anson, Defendant First American Title
Company, Inc., and its attorney of record Douglas Marfice and to the Clerk of the
above-entitled Court:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Plaintiff, Diana James, appeals to the Idaho Supreme Court from orders entered in the above-entitled action by The Honorable John P. Luster presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Orders described in paragraph three (3) above are appealable Orders under and pursuant to Rule 11(a) of the Idaho Appellate Rules.

3. The following orders are appealed in this appeal:

- a. Order Re: Mercea's motion for summary judgment filed April 5, 2010;
- b. Final Judgment Dismissing Plaintiff's Complaint as Against Defendants Mercea filed July 9, 2010;
- c. Memorandum Opinion and Order Re: Plaintiff's Motion to Vacate Judgment/Reconsideration and Mercea's Motion to Determine Attorney Fees and Costs and Plaintiff's Motion to Disallow Costs and Attorney Fees filed August 31, 2010;
- d. Supplemental Final Judgment Dismissing Plaintiff's Complaint as Against Defendants Mercea and Awarding Attorney Fees and Costs filed September 15, 2010;
- e. Order denying Plaintiff's Motion to Strike;

4. The primary issues presented by this appeal include, but are not limited to, the following:

- (a) Did the Court err in granting the Mercea Defendants summary judgment?
- (b) Did the Court err in finding that the Merceas were not obligated to disclose the public right of way running down the center of the driveway to the home purchased by Plaintiff?
- (c) Did the Court err by denying the Plaintiff's motion to strike the photographs and narrative descriptions of the photographs of the Merceas?
- (d) Should Plaintiff be allowed to recover attorney fees on appeal?
- (e) And such other additional issues as may be revealed from a detailed inspection of the record in this proceeding.

5. (a) A reporter's transcript has been requested and the required fees will be paid on determination of an estimated cost.

(b) The Plaintiff requests the preparation of the following transcripts of hearings before the Court from Court Reporter, Anne MacManus:

- i. The hearing on the motion for summary judgment filed by Defendants Mercea held on February 4, 2010;
- ii. The hearing on the motion for reconsideration and motion to amend held May 25, 2010;
- iii. The hearing on Plaintiff's Motion to Vacate Judgment/Reconsideration, Plaintiff's Motion to

Disallow Costs and Defendants Merceas' Motion to
Determine Attorney Fees and Costs held August 19,
2010;

iv. All pleadings and amended pleadings;

6. The Plaintiff requests that the Clerk's record include the documents specified in subsection (b)(1) of Rule 28 of the Idaho Appellate Rules as well as the following documents:

- (a) Defendant Merceas' motion for summary judgment together with all affidavits, memorandum, and statements of uncontested facts submitted in support of the motion;
- (b) Plaintiff's briefs in opposition to the motion for summary judgment of Defendants Mercea and all affidavits and memorandum offered by Plaintiff in support of the opposition;
- (c) Defendants Merceas' motion for reconsideration together with all affidavits and memorandum submitted in support of the motion;
- (d) Plaintiff's motion for reconsideration/to amend order regarding Defendant Merceas' motion for summary judgment together with all affidavits and memorandum submitted in support of the motion;

- (e) Defendants response and/or opposition to Plaintiff's motion for reconsideration;
- (f) Defendant Merceas' motion to determine attorney fees and costs together with any and all affidavits and memorandum filed in support of the motion;
- (g) Plaintiff's motion to disallow costs and attorney fees together with any and all affidavits and memorandum filed in opposition to Defendants' motion for attorney fees and costs;
- (h) Plaintiff's motion to vacate judgment/reconsideration together with all affidavits and memorandum submitted in support of the motion;
- (i) Defendant Merceas' response to Plaintiff's motion to vacate judgment/reconsideration together with any and all affidavits and memorandum filed in support of the response.

7. Plaintiff further request that the District Court Clerk forward all exhibits that have been offered in the course of the various motions before the District Court that are, in whole or part, the subject of the instant appeal. Plaintiff further requests that any exhibits forwarded to the Supreme Court be identified in a Clerk's certificate accompanying the Clerk's record.

8. I hereby certify:

(a) That a copy of this Notice of Appeal has been served on the Clerk of the District Court.

(b) That a request has been made with the Clerk of the District Court for a determination of the estimated fee for the clerk's record.

(c) Said fee will be paid upon determination of the appropriate amount.

(d) That a copy of this notice of appeal has been served on each reporter or whom a transcript has been requested as named below at the address set out below:

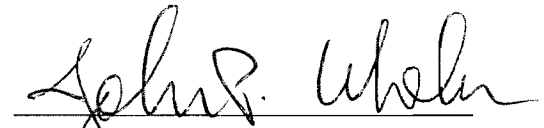
Anne MacManus
Kootenai County District Court
324 W. Garden Ave.
P.O. Box 9000
Coeur d'Alene, ID 83816

(d) A reporter's transcript has been requested and the required fees will be paid on determination of an estimated cost.

(e) Service has been made on all parties required to be served pursuant to Rule 20 of the Idaho Appellate Rules.

DATED this 7th day of October, 2010.

JOHN P. WHELAN, P.C.


A handwritten signature in cursive script, reading "John P. Whelan", is written over a horizontal line.

John P. Whelan

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7 day of October, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed as indicated below:

Edward J. Anson
Witherspoon, Kelley, Davenport & Toole, P.S.
608 Northwest Boulevard
Suite 401
Coeur d'Alene, ID 83814

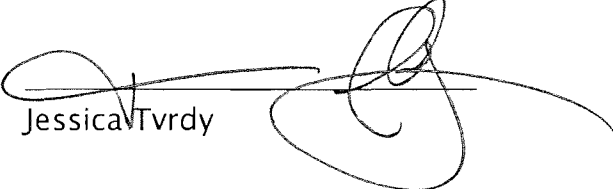
- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile to: 667-8470

Douglas S. Marfice
Ramsden & Lyons, LLP
700 Northwest Blvd.
P.O. Box 1336
Coeur d'Alene, ID 83816-1336

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile to: 664-5884

Anne MacManus
Kootenai County District Court
324 W. Garden Ave.
P.O. Box 9000
Coeur d'Alene, ID 83816

- ☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Facsimile to:


Jessica Tvrdy

THE SUPREME COURT OF THE

STATE OF IDAHO

DIANE JAMES,

Plaintiff-Appellant

VS

CORNELIUS MERCEA and PATRICIA
MERCEA, husband and wife, FIRST
AMERICAN TITLE COMPANY, INC.,

Defendants-Respondents,

and

JOE A. LAMPHIEAR and SUSAN M.
LAMPHIEAR, husband and wife, and
FIRST AMERICAN TITLE INSURANCE
COMPANY,

Defendants.

SUPREME COURT NO.
38135-2010

CLERK'S CERTIFICATE

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full and correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules.

I certify that the Attorneys for the Appellants and Respondents were notified that the Clerk's Record and Reporter's Transcript were complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid, on the 28 day of Dec, 2010.

I do further certify that the Clerk's Record and Reporter's Transcript will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 28 day of Dec, 2010.

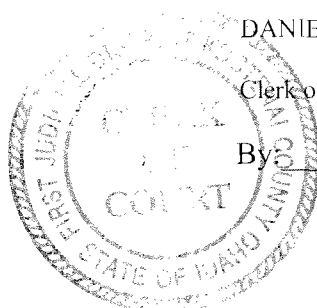
DANIEL J. ENGLISH

Clerk of District Court

By

Debra D. Le

Deputy Clerk



IN THE SUPREME COURT OF THE
STATE OF IDAHO

DIANE JAMES,)
)
Plaintiff-Appellant)
)
VS)
)
CORNELIUS MERCEA and PATRICIA)
MERCEA, husband and wife, FIRST)
AMERICAN TITLE COMPANY, INC.,)
)
Defendants-Respondents,)
and)
)
JOE A. LAMPHIEAR and SUSAN M.)
LAMPHIEAR, husband and wife, and)
FIRST AMERICAN TITLE INSURANCE)
COMPANY,)
)
Defendants.)
_____)

SUPREME COURT NO.
38135-2010

Attorney for Appellant

John P. Whelan, P.C.
1213 N 4th Street
Coeur d'Alene, ID 83814

Attorneys for Respondents

Edward J. Anson
608 Northwest Blvd, Ste 300
Coeur d'Alene, ID 83814

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at
Kootenai, Idaho this 28 day of June, 2010

DANIEL J. ENGLISH
Clerk of the District Court
By: Debra D. Lew
Deputy Clerk

